85-1269

No. ____

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Petitioner,

—v.—

SIERRA CLUB, THE CITY CLUB OF NEW YORK, NYC CLEAN AIR CAMPAIGN, INC., and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PAUL J. CURRAN
Counsel of Record
BRUCE MARGOLIUS
LAURI A. NOVICK
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether an award of attorneys' fees against New York State based entirely upon the common law "bad faith" exception to the American Rule violates the Eleventh Amendment prohibition of awards of money damages against states.

2. Whether the affirmance, by the Second Circuit, of an award of common law "bad faith" attorneys' fees against New York State demonstrates an intolerable conflict between that Court and other Courts of Appeals.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 and 28.1

The following parties may have an interest in the outcome of this proceeding:

Sierra Club
The City Club of New York
Business for Mass Transit, Inc.
NYC Clean Air Campaign, Inc.
West 12th Street Block Association
Hudson River Fishermen's Association
Hudson County Citizens for Clean Air
Seymour Durst
Otis Burger
Mary Rowe
Howard Singer
United States Army Corps of Engineers
Federal Highway Administration

Attorneys for the above parties and the Solicitor General of the United States have been served with copies of this petition.

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IN THE

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OCTOBER TERM, 1985

No. ____

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Petitioner,

—against—

SIERRA CLUB, THE CITY CLUB OF NEW YORK, NYC CLEAN AIR CAMPAIGN, INC. and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

This petition for a writ of *certiorari* seeks review by this Court of a judgment and opinion of the United States Court of Appeals for the Second Circuit dated October 28, 1985, *Sierra Club* v. *United States Army Corps of Engineers*, 776 F.2d 383 (2d Cir. 1985) (attached hereto as Appendix A) (A 1) affirming in part and reversing in part a judgment of the United States District Court for the Southern District of New York dated July 19, 1984, based upon an opinion reported as *Sierra Club* v. *United States Army Corps of Engineers*, 590 F. Supp. 1509 (S.D.N.Y. 1984). Such opinion and judgment are attached hereto as Appendices B (A 19) and C (A 53).

JURISDICTION

The judgment of the Court of Appeals to which this petition is addressed was entered October 28, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only such provision involved is the Eleventh Amendment to the Constitution of the United States, which provides that:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

This petition arises as the result of a "bad faith" attorneys' fee award against the New York State Department of Transportation ("New York State") in connection with litigation concerning "Westway," a proposed highway to have been built on the lower west side of Manhattan.[1]

The fee award against New York State is based solely upon the district court's finding that, before and during two 1982 trials, New York State had acted in bad faith.

Plaintiffs, in the 1982 trials, challenged the Westway project on a variety of grounds. The district court found for the

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1 Such litigation involved two trials during 1982, the results of which are reported in Action for Rational Transit v. Westside Highway Project, 536 F. Supp. 1225 (S.D.N.Y. 1982) and Sierra Club v. United States Army Corps of Engineers, 541 F. Supp. 1367 (S.D.N.Y. 1982).

plaintiffs solely on the ground that the Environmental Impact Statement inadequately disclosed the possible impact of Westway on Hudson River striped bass. After the matter was remanded to the United States Army Corps of Engineers, a Supplemental Environmental Impact Statement was published and challenged at a trial in 1985. That trial, which resulted in a further injunction against construction of Westway, is not the subject of this petition.

The fee award was the product of an application by four of the eleven plaintiffs at the 1982 trials.[2] Such application was granted under the common law "bad faith" exception to the American Rule that parties ordinarily bear their own attorneys' fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975). There was no statutory basis for the award.

New York State argued, both in the district court and the Court of Appeals, that it was immune from an award of "bad faith" attorneys' fees by virtue of the Eleventh Amendment. The Court of Appeals, though noting that "other circuits are split on this issue," held that the Eleventh Amendment is not a bar to such an award and affirmed the district court's judgment on this issue. 776 F.2d at 388 (A 7-8).

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2 Several parties were added as plaintiffs and some deleted between 1982 and 1985.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT:

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF "BAD FAITH" ATTORNEYS' FEES AGAINST A STATE

The Eleventh Amendment bars suits for damages brought in federal courts against an unconsenting state by its own citizens as well as by citizens of another state. *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944); *Hans* v. *Louisiana*, 134 U.S. 1 (1890). This rule was reaffirmed in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), where this Court held that the Eleventh Amendment bars any award that is "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* at 668.

Edelman holds that a state may be sued in federal court for injunctive relief to remedy violations of federal law but, absent express waiver, not for damages. *Id.* at 664. The Second Circuit, however, has held that certain forms of damages, such as attorneys' fees, are "ancillary" to injunctive relief and, therefore, not prohibited by *Edelman*. *Sierra Club* v. *United States Army Corps of Engineers*, 776 F.2d 383, 388-89 (A 7-8). As demonstrated below, this holding rests on a distorted perception of the meaning of "ancillary." Other Courts of Appeals, however, following *Edelman*, have held that such fee awards constitute damages and that the Eleventh Amendment bars them. See pp. 7-8 *infra*.

This petition for a writ of certiorari should, therefore, be granted to resolve this conflict among the Circuits.

I. IN THE ABSENCE OF AN EXPLICIT WAIVER, THE ELEVENTH AMENDMENT ABSOLUTELY BARS AWARDS OF MONEY DAMAGES AGAINST STATES

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiffs successfully challenged the manner in which the State of Illinois administered the federal-state programs of Aid to the Aged, Blind, or Disabled ("AABD"). The district court entered an injunction governing the future administration of the AABD program and also rendered a money judgment for retroactive AABD benefits improperly denied plaintiffs. Such award was made as a part of an injunctive decree, and the Court of Appeals for the Seventh Circuit affirmed it, describing it as a form of "equitable restitution." This Court, however, held that the award was defective because

> "[i]t requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation . . . ." *Id.* at 668.

Indeed, in language that plainly applies to the present case, this Court recently stated that "compensatory or deterrence interests are *insufficient* to overcome the dictates of the Eleventh Amendment." *Green* v. *Mansour*, ___ U.S. ___, 106 S. Ct. 423, 426 (1985) (emphasis added). This Court, then, has consistently reaffirmed the important doctrine of state sovereign immunity and the vital role it plays in our federal system.

The significance of the Eleventh Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 98 (1984). The Eleventh Amendment declares a jurisdictional policy and "sets forth an explicit limitation on federal judicial power of such compelling force" that any encroachment on the scope of the Amendment must be examined with the highest

degree of judicial scrutiny. *See Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945).

There are certain well established exceptions to the reach of the Eleventh Amendment. A state may waive its immunity or Congress, in exercising its Fourteenth Amendment powers, may override the States' immunity. Yet, "because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States," the test for determining whether these conditions have been met is a stringent one. *Atascadero State Hospital* v. *Scanlon*, ____ U.S. ____, 105 S. Ct. 3142, 3145-47 (1985). To constitute a waiver of Eleventh Amendment immunity, a state statute or constitutional provision must specify the state's intention to subject itself to suit in federal court, and to establish a valid congressional override, Congress must make its intention unmistakably clear in the language of the statute. *Id.* at 3147; *see also Pennhurst State School & Hospital*, 465 U.S. at 98-99; *Quern* v. *Jordan*, 440 U.S. 332, 342-45 (1979).

For example, in *Atascadero State Hospital* v. *Scanlon, supra*, Congress had included in the Rehabilitation Act both provisions for funding employment programs for the handicapped and, subsequently, remedies for violations of the Act. Neither such provisions nor California's acceptance of funds provided by the Act were enough to constitute the sort of "unequivocal" waiver necessary to subject the state to federal court jurisdiction with regard to claimed violations of the Act.

Thus, while states themselves may waive or Congress may, by statute, override Eleventh Amendment immunity, there has been no finding—or even argument—that this occurred here. *Cf. Quern* v. *Jordan, supra; Hutto* v. *Finney*, 437 U.S. 678 (1978); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

II. "BAD FAITH" ATTORNEYS' FEES ARE BARRED BY THE ELEVENTH AMENDMENT

"Bad Faith" fee awards have been found to be a form of damages—and, therefore, to violate the Eleventh Amendment—by the United States Court of Appeals for the Sixth Circuit. *Jordan* v. *Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) ("Although appellees urge that attorneys' fees are analogous to costs, the taxing of which is permitted against states [footnote omitted], the test for determining whether a particular type of relief passes muster, as set out in *Edelman*, indicates the opposite."); *Taylor* v. *Perini*, 503 F.2d 899, 901 (6th Cir. 1974), *vacated on other grounds*, 421 U.S. 982 (1975) ("such an award is barred by the Eleventh Amendment"); *Huecker* v. *Milburn*, 538 F.2d 1241, 1244 (6th Cir. 1976) ("This court has found no meaningful distinction between an award of attorneys' fees and an award of damages for purposes of the Eleventh Amendment, where the award is for 'a past breach of legal duty' by state officials . . .").

The Fourth Circuit has also held that such awards violate the Eleventh Amendment. *Hallmark Clinic* v. *North Carolina Department of Human Resources*, 519 F.2d 1315, 1317 (4th Cir. 1975); *see also Woolfolk v. Brown*, 358 F. Supp. 524, 537 (E.D. Va. 1973), *aff'd in part and rev'd in part*, 538 F.2d 598 (4th Cir. 1976). Additionally, district courts in other circuits have held that the Eleventh Amendment bars an award of attorneys' fees against the state. *United States v. Washington*, 66 F.R.D. 477, 481 (W.D. Wash. 1974) (an award of attorneys' fees would clearly violate the fiscal integrity of the state and is thereby precluded by the Eleventh Amendment); *Murgia v. Commonwealth of Massachusetts Board of Retirement*, 386 F. Supp. 179, 182 (D. Mass. 1974), *summarily aff'd*, 421 U.S. 972 (1975) (bad faith fees award "reflects independent policy considerations unrelated to the enforcement of injunctions, and in no sense can be termed 'integral' to such relief.").

The application, then, of the Eleventh Amendment to the awarding of "bad faith" attorneys' fees by a federal court is supported by both a substantial body of lower court case law, and also by the decisions of this Court that have strictly construed the principle of state sovereign immunity. Indeed, "the fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion." *See Atascadero*, 105 S. Ct. at 3147.

III. THE CONFLICT AMONG THE CIRCUITS MAY ONLY BE RESOLVED BY THIS COURT

In its opinion in this case, the Second Circuit wrote,

> "Although the Supreme Court arguably considers the issue of whether the Eleventh Amendment bars an award of attorneys' fees against a state under the common law an open one, [footnote omitted] and although *other circuits are split* on this issue, [footnote omitted] we have consistently held that the Eleventh Amendment is not a bar." *Sierra Club* v. *United States Army Corps of Engineers*, 776 F.2d 383, 388-89 (A 7) (emphasis added).

While a split in the circuits clearly exists, it has not been described accurately by the Second Circuit.[3] For example, in *Bond v. Stanton*, 528 F.2d 688, 690-92 (7th Cir.), *vacated and remanded*, 429 U.S. 973 (1976), the Seventh Circuit sustained an award of "bad faith" attorneys' fees. But this Court *vacated* that judgment and remanded the case for considera-

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3 The Second Circuit described the split among "other circuits" in this manner:

> "Compare Bond v. Stanton, 528 F.2d 688, 690-92 (7th Cir. 1976), *remanded*, 429 U.S. 973 (1976); Thonen v. Jenkins, 517 F.2d 3, 7-8 (4th Cir. 1975); Souza v. Travisono, 512 F.2d 1137, 1139-40 (1st Cir.), *remanded*, 423 U.S. 809 (1975), with Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315, 1317 (4th Cir. 1975); Jordon v. Gilligan, 500 F.2d 701, 705-10 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975)." 776 F.2d at 388-89 n.3. (A 7).

tion in light of 42 U.S.C. § 1988, which provides a statutory basis for such an award. In *Souza* v. *Travisono*, 512 F.2d 1137, 1139-40 (1st Cir.), *vacated and remanded*, 423 U.S. 809 (1975), the First Circuit sustained an award of attorneys' fees against Rhode Island officials under the "public benefit-private attorney general" theory. This Court, however, vacated that judgment and remanded the case for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which rejected the "private attorney general" rationale. On remand, the district court and First Circuit relied on 42 U.S.C. § 1988 rather than on common law principles for a new award of attorneys' fees. *Souza* v. *Southworth*, 564 F.2d 609, 610 (1st Cir. 1977). Thus, neither of these cases comports with the Second Circuit's interpretation.

The Second Circuit correctly cited *Thonen* v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975), as a case in which "bad faith" fees were awarded against a state, but failed to note that it was soon followed by *Hallmark Clinic, supra*, which reached the opposite result. In the present case, however, the Second Circuit relied not upon other Circuits, but upon a line of its own cases that misinterpret *Edelman* and two other cases decided by this Court. In so doing, the Second Circuit ignored a long line of this Court's Eleventh Amendment decisions that require the opposite result. *See, e.g.*, pp. 5-6, *supra*.

The Second Circuit clearly misapplies *Hutto* v. *Finney*, 437 U.S. 678 (1978), where this Court held that an award of attorneys' fees against the State of Arkansas did not violate the Eleventh Amendment, for the basis of that award was not the "bad faith" exception invoked here. The district court in *Hutto* had previously ordered a series of remedial measures to correct Eighth and Fourteenth Amendment violations in the Arkansas prison system; none of these orders was complied with. Finally, the district court *informed the parties that it would award attorneys' fees* and costs if the plaintiffs had to return to court to enforce the court's orders. 437 U.S. at 683-84. Subsequently, when the prison officials still had not complied with the orders,

the district court found that they had acted in bad faith and awarded attorneys' fees to the plaintiffs *for their return to court to enforce the prior orders.* 437 U.S. at 685.

In *Hutto*—unlike the instant case—the award was needed to protect the court's ability to insure compliance with an order once the order was entered and non-compliance was demonstrated. The district court "was not remedying the present effects of a violation in the past." 437 U.S. at 687 n.9. Rather, the award "served the same purpose as a remedial fine imposed for civil contempt. It vindicated the District Court's authority over a recalcitrant litigant." 437 U.S. at 691.

This Court held that:

> "If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance. The principles of federalism that inform Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail [footnote omitted]. The less intrusive power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief." *Id.*

Hutto, then, holds only that a district court may award attorneys' fees when such an award is necessary in order to enforce its orders. Moreover, this Court made clear in *Quern* v. *Jordan*, 440 U.S. at 344-45, that the fee award in *Hutto* had a statutory basis in 42 U.S.C. § 1988.

The Second Circuit also relies mistakenly on *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala.), *summarily aff'd*, 409 U.S. 942 (1972), a pre-*Edelman* summary affirmance of a district court award of attorneys' fees against a state. *See Gagne* v. *Maher*, 594 F.2d 336, 342 n.5 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122 (1980). *Sims*, however, was implicitly overruled

by *Edelman*[4] and clearly regarded by this Court as something less than a definitive statement by it on the issue. *Alyeska Pipeline*, 421 U.S. at 269 n.44. Indeed, this Court declined to reach the Eleventh Amendment issue in its review of *Gagne*, where it clearly regarded the question of whether the Eleventh Amendment bars a "bad faith" fee award against a state as an open one. *Maher* v. *Gagne*, 448 U.S. 122, 130 (1980).

The key to the Second Circuit's erroneous interpretation of *Edelman* is in its distortion of the meaning of the statement of this Court that the injunctive relief granted by a federal court might legitimately have an "ancillary *effect* on the state treasury." 415 U.S. at 668 (emphasis added). From this statement, the Second Circuit has created an inconsistent jurisdictional doctrine that an award of money damages is sometimes "ancillary" to an injunction. 776 F.2d at 389 (A 7-8). This type of award, however, is indistinguishable from the "equitable restitution" that was forbidden in *Edelman*. 415 U.S. at 665-71.

This Court has recently made plain the very significant difference between the "ancillary effect" referred to in *Edelman* and the sort of ancillary jurisdiction the Second Circuit seeks to exercise here. *County of Oneida* v. *Oneida Indian Nation*, ____ U.S. ____, 105 S. Ct. 1245, 1260 (1985) ("The Eleventh Amendment forecloses, however, the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State."). *See also Pennhurst State School & Hospital*, 465 U.S. at 122 ("Under *Edelman* v. *Jordan, supra*, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court.")

This Court has laid the foundation for the questions raised by this petition without actually answering them. The Second

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4 In Edelman, this Court expressly overruled a group of summary affirmances. 415 U.S. at 670 n.13. This list of cases, which did not include Sims, "was not necessarily intended to be exhaustive." Quern v. Jordan, 440 U.S. at 336-37 n.5.

Circuit, though, has treated as settled the issue that this Court has not yet reached. The time has come now to reach that issue, for the present case involves no arguable statutory basis for the fee award and flies in the face of this Court's recent decisions requiring an unequivocal authorization by Congress or the state itself for any award of damages, no matter how it is described or how it is rationalized.

CONCLUSION

As demonstrated above, the Court of Appeals' holding in this case continues a split among the circuits that this Court should resolve. Moreover, the Court of Appeals' holding herein violates the Eleventh Amendment's prohibition of an award of money damages against a state. For these reasons, New York State respectfully requests that this Court grant this petition for a writ of certiorari.

Dated: January 27, 1986

Respectfully submitted,

Paul J. Curran
Counsel of Record
Bruce Margolius
Lauri A. Novick

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 407-8000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued Feb. 26, 1985

Decided Oct. 28, 1985

Nos. 634, 635 and 747, Dockets 84-6287, 84-6289 and 84-6293

SIERRA CLUB, The City Club of New York, Business For Mass Transit, Inc., NYC Clean Air Campaign, Inc., West 12th Street Block Association, Hudson River Fishermen's Association, Hudson County Citizens For Clean Air, Seymour Durst, Otis Burger, Mary Rowe, and Howard Singer,

Plaintiffs,

Sierra Club, The City Club of New York, NYC Clean Air Campaign, Inc., and Hudson River Fishermen's Association,

Plaintiffs-Appellees, Cross-Appellants,

—v.—

UNITED STATES ARMY CORPS OF ENGINEERS, John Marsh, as Secretary of the Army of the United States, Joseph K. Bratton, as Chief of Engineers, Walter M. Smith, Jr., as New York District Engineer of the United States Army Corps of Engineers, and William C. Hennessy, as Commissioner of the New York State Department of Transportation, United States Department of Transportation, Andrew L. Lewis, Jr., as Secretary of Transportation of the United States, Raymond A. Barnhart, as Administrator of the Federal Highway Administration,

Defendants-Appellants, Cross-Appellees.

THE CITY OF NEW YORK,

Defendant-Intervenor.

HOWARD WILSON, Asst. U.S. Atty., S.D.N.Y., New York City (Rudolph W. Giuliani, U.S. Atty., S.D.N.Y., Peter C. Salerno, Asst. U.S. Atty., S.D.N.Y., New York City, of counsel), *for Defendant-Appellant U.S. Army Corps of Engineers.*

PAUL J. CURRAN, New York City (Bruce Margolius, Steven E. Shapiro, Kaye, Scholer, Fierman, Hays & Handler, New York City, of counsel), *for Defendant-Appellant New York State Dept. of Transp.*

ALBERT K. BUTZEL, New York City (Mitchell S. Bernard, Jean M. McCarroll, Butzel & Kass, New York City, of counsel), *for Plaintiffs-Appellees.*

Before:

OAKES, MESKILL and KEARSE, *Circuit Judges.*

MESKILL, *Circuit Judge*:

Appellants the United States Army Corps of Engineers (Corps) and the Commissioner of the New York State Department of Transportation (State) appeal from a judgment entered against them and the Federal Highway Administration (FHWA) in the United States District Court for the Southern District of New York, Griesa, *J.*, awarding attorneys' fees to appellees. The district court awarded the fees under the bad faith exception to the American Rule. Appellees cross-appeal the denial of their request for an award of fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1982) (EAJA). For the reasons that follow, we affirm in part, reverse in part and remand the case to the district court.

BACKGROUND

The instant appeal and cross-appeal involve "Westway," the once-proposed replacement for a portion of the West Side Highway in lower Manhattan. Other installments in this lengthy dispute are *Sierra Club v. United States Army Corps of*

Engineers, 772 F.2d 1043, 1046 (2d Cir. 1985); *Sierra Club v. United States Army Corps of Engineers*, 732 F.2d 253 (2d Cir. 1984); *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983); and *Sierra Club v. Hennessy*, 695 F.2d 643 (2d Cir. 1982). In this appeal and cross-appeal we are called on to review the district court's ruling on appellees' attorneys' fees application. Because the facts of this case have been exhaustively reviewed in our previous opinions and in the district court's opinions, we detail here only those facts that are necessary to an understanding of our decision.

The district court's decision to award fees is reported in *Sierra Club v. United States Army Corps of Engineers*, 590 F.Supp. 1509 (S.D.N.Y. 1984) (*Sierra Club III*). The award is based on conduct that occurred at two separate trials, the results of which are reported in *Action for Rational Transit v. West Side Highway Project*, 536 F.Supp. 1225 (S.D.N.Y. 1982), and *Sierra Club v. United States Army Corps of Engineers*, 541 F.Supp. 1367 (S.D.N.Y. 1982) (*Sierra Club I*). *Action for Rational Transit* involved appellees,[1] the Corps and the State. The dispute concerned the Corps' issuance of a landfill permit for Westway. Appellees claimed that because the Corps relied on an Environmental Impact Statement (EIS) issued in 1977 by the State and FHWA which inadequately dealt with fisheries issues, refused to supplement that EIS when subsequent studies showed the magnitude of the EIS' error and failed to independently and adequately to consider fisheries issues, its issuance of the landfill permit violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1982), section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1982), and section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1982). The district court agreed that NEPA, the Clean Water Act and the Rivers and Harbors Act

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1 Although there were twelve plaintiffs before the district court, only four joined in the fee application. According to appellees, this was done because only these four plaintiffs contributed to the costs of litigation. Br. of Appellees at 1 n. 1. *See also Sierra Club v. United States Army Corps of Engineers*, 590 F.Supp. 1509, 1512 n. 1 (S.D.N.Y. 1984).

had been violated and issued an injunction setting aside the landfill permit.

After the first trial was concluded, the complaint was amended to add FHWA as a defendant and the parties were given the opportunity to offer additional evidence. Appellees, the State and FHWA were involved in this second trial. At issue was FHWA's approval of Westway and its alleged violation of NEPA by relying on the inaccurate 1977 EIS and refusing to supplement that EIS when new fisheries information became available. In *Sierra Club I*, the district court found that the 1977 EIS was inaccurate and inadequate when issued and that "FHWA, in collaboration with the [State], acted in willful derogation of the requirements of law in failing to issue a corrective supplemental environmental impact statement." 541 F.Supp. at 1383. It, therefore, nullified FHWA approval of the design, location and funding of Westway.

Appeals were taken from both district court decisions. The Corps and FHWA limited their appeals to certain aspects of the relief order. The State, however, challenged both the relief ordered and the merits of the court's decisions. The results of these appeals are reported in *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983) (*Sierra Club II*).

On the merits, we affirmed the district court's conclusion that FHWA and the Corps had violated NEPA by relying on the 1977 EIS in reaching their decisions. 701 F.2d at 1029-31. We also shared the district court's view that initial responsibility for the EIS' inaccuracies on the fisheries issues must be attributed to the State. *Id.* at 1031. The court's finding that the Corps had violated the Clean Water Act was also affirmed. *Id.* at 1031-33. However, because no private cause of action exists under section 10 of the Rivers and Harbors Act, we reversed the finding that the Corps had violated that section. *Id.* at 1033.

With respect to the relief ordered by the district court, we upheld the court's requirement that a supplemental EIS on fisheries issues be prepared before further work on Westway could proceed. *Id.* at 1034-35. We also affirmed the court's

requirement that FHWA, the Corps and the State keep "records of all activities, deliberations, and communications . . . which occur in relation to [the Westway] permit application." *Id.* at 1040-41. However, we vacated those parts of the court's order that required the supplemental EIS to include information on nonfisheries issues, *id.* at 1035-37, that prohibited FHWA and the Corps from acting as joint lead agencies, *id.* at 1041-42, and that appointed a special master to oversee compliance by FHWA and the Corps with the court's directives, *id.* at 1042-49.

Appellees' fee application was originally filed after the district court's decision in *Action for Rational Transit* and was supplemented after the court's decision in *Sierra Club I* and our decision in *Sierra Club II*. Appellees sought to recover their fees from FHWA, the Corps and the State under the bad faith and common benefit exceptions to the American Rule. They also sought to recover fees from FHWA and the Corps under the EAJA.

In *Sierra Club III*, the district court rendered its decision on the fee application. The court refused to award fees under the common benefit rule because of its belief that the rule was not applicable to the case before it. 590 F.Supp. at 1525-26. It also rejected the claim for fees under the EAJA, holding that one plaintiff's ineligibility for fees under the EAJA barred all plaintiffs from recovering fees. *Id.* at 1526.

The court did, however, award fees and disbursements under the bad faith exception to the American Rule. The court found that the Corps and the State acted in bad faith at the first trial. *Id.* at 1517-22. It also found that FHWA and the State acted in bad faith before and during the second trial. *Id.* at 1522-25. Finally, the court awarded fees against the State in connection with the appeal, finding that the State's appeal on the merits was "merely a further assertion of the baseless positions taken in the district court." *Id.* at 1525. Limiting the award to expenses incurred on fisheries related work and declining to apply a multiplier, the court awarded appellees a total of $290,254.

In awarding fees against the State, the court rejected the State's claim that it was immune from a fee award. First, relying on our decision in *Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), the court rejected the State's argument that the award was barred by the Eleventh Amendment. Second, reasoning that an award of fees under the bad faith exception differs from an award of punitive damages, the court held that the award of bad faith fees against the State was not barred by public policy as expressed in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

DISCUSSION

The State and the Corps, but not FHWA, appeal the award of fees. The State raises four basic arguments: (1) the award of fees against it violates the Eleventh Amendment; (2) the award of fees under the bad faith exception constitutes an award of punitive damages from which it is immune; (3) the district court's finding of bad faith is unwarranted; and (4) the district court's calculation of fees is defective. The Corps limits its appeal to a claim that the record does not support the district court's finding of bad faith. For their part, appellees cross-appeal the court's holding that they are ineligible for fees under the EAJA.

A. *Immunity*

As a threshold matter, the State argues that it is immune from an award of fees. This argument has two components. First, the State claims that the Eleventh Amendment is an absolute bar to an award of fees against a state. In making this argument, the State relies on the general proposition announced in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), that absent a waiver of sovereign immunity a federal court may not award money damages against a state. Second, the State claims that even if the Eleventh Amendment does not bar an award of attorneys' fees

against a state in general, the award of fees under the bad faith exception constitutes punitive damages, the awarding of which is barred by public policy. In making this argument, the State relies on *City of Newport*, where the Supreme Court invoked public policy considerations in reversing an award of punitive damages against a municipality.

The State's Eleventh Amendment argument need not detain us long. Although the Supreme Court arguably considers the issue of whether the Eleventh Amendment bars an award of attorneys' fees against a state under the common law an open one,[2] and although other circuits are split on this issue,[3] we have consistently held that the Eleventh Amendment is not a bar.

The first case in which we expressed our view that an award of fees against a state fits within the "ancillary effect" doctrine of *Edelman* was *Jordan v. Fusari*, 496 F.2d 646, 651 (2d Cir. 1974). We subsequently affirmed that position in *Class v. Norton*, 505 F.2d 123, 126-27 (2d Cir. 1974), and *Fitzpatrick v. Bitzer*, 519 F.2d 559, 571 (2d Cir. 1975), *aff'd in part, rev'd in part*, 427U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Most recently, our position on this issue was restated in *Gagne*, 594 F.2d at 336. The State points to no decision since *Gagne* that causes us to question our long held position. "Thus, we adhere to our own precedents, which we believe are consistent with

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2 Compare *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 n. 44, 95 S.Ct. 1612, 1627, n. 44, 44 L.Ed.2d 141 (1975) (award of fees against a state would raise Eleventh Amendment issues that Court does not decide) with *Hutto v. Finney*, 437 U.S. 678, 689-92, 98 S.Ct. 2565, 2572-74, 57 L.Ed.2d 522 (1978) (award of bad faith fees against a state that refused to comply with injunction upheld).

3 Compare *Bond v. Stanton*, 528 F.2d 688, 690-92 (7th Cir. 1976), *remanded*, 429 U.S. 973, 97 S.Ct. 479, 50 L.Ed.2d 581 (1977); *Thonen v. Jenkins*, 517 F.2d 3, 7—8 (4th Cir. 1975); *Souza v. Travisono*, 512 F.2d 1137, 1139—40 (1st Cir.), *remanded*, 423 U.S. 809, 96 S.Ct. 19, 46 L.Ed.2d 29 (1975), with *Hallmark Clinic v. North Carolina Department of Human Resources*, 519 F.2d 1315, 1317 (4th Cir. 1975); *Jordan v. Gilligan*, 500 F.2d 701, 705—10 (6th Cir. 1974), *cert. denied*, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975).

Supreme Court authority, and hold that the award of attorneys' fees in this case was a permitted 'ancillary effect' of a proper prospective decree and therefore not barred by the Eleventh Amendment." *Gagne*, 594 F.2d at 342.[4]

We also find the State's punitive damages argument unconvincing. The basis of its argument is *City of Newport*. In that case, the Supreme Court held that a municipality is immune from an award of punitive damages under 42 U.S.C. § 1983 (1982). The Court stated that punitive damages "are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct." 453 U.S. at 266-67, 101 S.Ct. at 2759. Looking to the punitive component, the Court explained that "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267, 101 S.Ct. at 2760.

Seizing on the punitive aspect of an award of bad faith attorneys' fees, the State claims that an award of bad faith fees is barred by the holding of *City of Newport*. We believe that an award of fees under the bad faith exception rests on different principles than does an award of punitive damages. Although the award of fees for bad faith has a punitive and deterrent flavor, the award serves a compensatory purpose. *Cf. Stolberg v. Members of the Board of Trustees*, 474 F.2d 485, 489-90 (2d Cir. 1973), *cert. denied*, 429 U.S. 897, 97 S.Ct. 260, 50 L.Ed. 2d 181 (1976). That is why we require that the award be limited to those expenses necessary to counter the losing party's bad faith. *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977). Thus, we do not find the rationale of *City of Newport* controlling.

Our position is supported by relevant Supreme Court precedent. *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d

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4 The State attempts to limit *Gagne's* holding to an allowance of fees under a statute enacted pursuant to section 5 of the Fourteenth Amendment. A reading of *Gagne*, however, clearly shows that we talked of two exceptions to the Eleventh Amendment, one under *Edelman* and one under section 5. 594 F.2d at 341—42. Thus, we reject the State's narrow reading of *Gagne*.

522 (1978). In its reliance on *City of Newport*, the State ignores *Hutto*, which is more directly on point. In *Hutto*, the Court sanctioned the use of a fee award to secure a state's compliance with a district court's order. The basis of the award was the state's bad faith. *Id.* at 689, 98 S.Ct. at 2572. Nowhere did the Court suggest that such an award was barred as a form of retribution against innocent taxpayers. Thus, *Hutto* allows a federal court to so "penalize" a state based on its bad faith conduct before that court and nothing in *City of Newport* indicates a retreat from that position.

In sum, a federal court has the inherent power to award attorneys' fees against a party who litigates in bad faith. Such authority is a necessary incident to the power to regulate the conduct of the parties before the court. In the instant case, neither the Eleventh Amendment as construed in *Edelman* nor public policy as expressed in *City of Newport* immunizes the State from the result of the court's exercise of this power. Thus, we hold that the district court had the authority to award fees against the State.

B. *Bad Faith*

1. *Standards*

Under what is known as the American Rule, parties to litigation normally pay their own attorneys' fees regardless of the lawsuits outcome. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). There are, however, certain exceptions to this general rule. One of these exceptions is where the court determines that the unsuccessful party has " 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska*, 421 U.S. at 258-59, 95 S.Ct. at 1622 (quoting *F.D. Rich Co. v. United States*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)). The award of fees pursuant to this exception is an exercise of a federal court's "inherent equitable powers." *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985).

Under the law in this Circuit, to award fees under the bad faith exception a court must find clear evidence that the losing party's claims were "entirely without color and made for reasons of harassment or delay or for other improper purposes." *Browning Debenture Holders'*, 560 F.2d at 1088; *Eastway Construction*, 762 F.2d at 253.[5] The test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice. *Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 898 (2d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983). Under this test, a claim is "entirely without color" when it lacks any legal or factual basis. *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (per curiam) (*Nemeroff I*). While there is no precise definition of "improper purpose" it may be evidenced by conduct occurring either before or during trial. *Cf. Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702 (1973).

An award of fees under the bad faith exception calls for a two-tiered standard of review. A district court's determination that bad faith exists is a factual finding which may only be set aside if it is clearly erroneous. *See Perichak v. International Union of Electrical Radio and Machine Workers*, 715 F.2d 78, 79 (3d Cir. 1983); *Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980); *Nemeroff I*, 620 F.2d at 347. In addition, because the awarding of fees involves an exercise of equitable powers, the decision to award or deny fees

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5 The parties talk of two types of bad faith, pre-litigation bad faith and bad faith during trial, and set forth different standards to control each situation. Compare the supposed pre-litigation standard of *Stolberg v. Members of the Board of Trustees*, 474 F.2d 485, 490 (2d Cir. 1973) (was the bringing of the action unnecessary and compelled by the defendant's "unreasonable, obdurate obstinacy") with the *Browning Debenture Holders'* standard, 560 F.2d at 1088 (did a party present colorless claim for an improper purpose). While there may be situations where this distinction is useful, in the instant case, where the parties have gone through two trials and an appeal, we see no reason to make such a distinction. Thus, here we apply only the *Browning Debenture Holders'* standard and look to activity both before and during trial for evidence of an improper purpose. *See Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 22-25 (S.D.N.Y. 1980).

lies in the discretion of the district court. Thus, even where the district court's finding of bad faith is not clearly erroneous, we must still review the award to determine if it was a proper exercise of discretion. *See Perichak*, 715 F.2d at 80; *Nemeroff v. Abelson*, 704 F.2d 652, 660-61 (2d Cir. 1983) (*Nemeroff II*); *Lipsig*, 663 F.2d at 181-82. If the court did not abuse its discretion, the award of fees must be affirmed.

2. *Merits*

The various legal claims advanced by the Corps at the first trial and by the State at both trials, as well as the factual support for those claims, have been dealt with in great detail in our *Sierra Club II* opinion and in the district court's *Sierra Club III*, *Sierra Club I* and *Action for Rational Transit* opinions. We need not explore the legal and factual details of those trials again. Briefly, the description in the 1977 EIS of the area to be filled as a biological wasteland was a gross error. The claims that this document could be relied on to support agency action and that the subsequent data revealing the magnitude of the EIS' inaccuracy had been carefully considered and did not warrant supplementation were legally weak and void of factual support. The district court's finding that these claims were entirely without color was not clearly erroneous.

The second part of the *Browning Debenture Holders'* standard, improper purpose, is more troublesome. With respect to the Corps, the district court merely stated that since the Corps' defenses were colorless, "it must be concluded that [they] were asserted for an improper purpose." 590 F.Supp. at 1521. This conclusion does not necessarily follow. Although a frivolous position will often signal an improper purpose, we have never held that a frivolous position may be equated with an improper purpose. Such a simple equation would turn the two-part standard into a one-part standard, a step we decline to take. *See, e.g., Colombrito,* 764 F.2d at 133; *PRC Harris,* 700 F.2d at 898; *cf. Gianna Enterprises v. Miss World (Jersey) Ltd.*, 551 F. Supp. 1348, 1360 (S.D.N.Y. 1982). In the absence of a proper finding of improper purpose, the district court's con-

clusion that the Corps acted in bad faith at the first trial must be reversed.

The State stands in a different light. Although when discussing the first trial the district court merely equated the State's colorless position with an improper purpose, later in its opinion the court clearly identified the State's improper purpose as an attempted coverup. Furthermore, the court found that the State's bad faith pre-dated the litigation. The court stated:

> There is simply no escape from the conclusion that the authorized representatives of the State and FHWA engaged in bad faith conduct prior to the litigation. Moreover, it is the kind of conduct which is most germane to an application for attorneys' fees. Part of the activities of the State and FHWA consisted of an attempt to create a record of purported scientific judgment (*e.g.*, the misleading conclusion in the LMS report) and purported agency discretion (*e.g.*, the October 9, 1980 letter from FHWA to the Corps.). It is perfectly obvious that the intention was to have this "record" available to forestall or rebut a challenge to the agency action. This is exactly the use that has been made of these materials. Defendants have relied heavily on them for their defense in this litigation.

590 F.Supp. at 1524 (footnote omitted); *see also Sierra Club I*, 541 F.Supp. at 1381. We have previously stated our agreement with this basic conclusion. *Sierra Club II*, 701 F.2d at 1047. It certainly is not clearly erroneous. Thus, the district court's finding that the State had an improper purpose must stand.[6]

Given the State's manipulative and deliberately deceptive conduct, we cannot say that the court's decision to award fees on the basis of this bad faith was an abuse of discretion. The

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6 The State appears to claim that this finding only amounts to pre-litigation bad faith and does not amount to bad faith during the litigation. Our response is twofold. First, the distinction the State draws between pre-litigation bad faith and bad faith during trial is not relevant in this case. *See* note 5, *supra*. Second, given the nature of the State's conduct, it is only reasonable to conclude that this improper purpose carried forward through both trials.

State was not a passive participant in this matter. It drafted the 1977 EIS; it controlled the data that showed the inadequacies in the 1977 EIS; it misrepresented the significance of that data; and it actively litigated the issues involved in these lawsuits. Its claims that it owed no duty to anyone ring hollow. At least when it sought federal funding for Westway and drafted the 1977 EIS, and definitely when it became involved in the lawsuit before the district court, the State had a minimum duty to refrain from bad faith actions. It failed to fulfill this duty. Therefore, we affirm the district court's award of bad faith fees against the State based on the State's conduct at the two trials.

The district court also awarded fees based on the State's appeal of the merits of the district court's rulings. The State argues that this was error as only this Court may determine whether fees should be awarded for an appeal. The district court rejected this claim, asserting that it had authority to award fees for an appeal under *Perkins v. Standard Oil Co.*, 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1970) (per curiam).

We agree with the State's position on this issue. There is a basic distinction between determining entitlement to fees and determining the amount of fees. *Perkins* merely holds that fees expended on an appeal are recoverable under section 4 of the Clayton Act and that the district court may calculate the amount of fees for appellate work. There, the statute, not the district court, determined entitlement to fees. Our opinion in *Cohen v. West Haven Board of Police Commissioners*, 638 F.2d 496, 505-06 (2d Cir. 1980), is similar to *Perkins*. In *Cohen*, we determined that a party prevailed on an appeal in a civil rights case and remanded to the district court for a calculation of fees. We did not state that the district court could determine entitlement to attorney's fees.

In fact, our court has twice expressed doubts about whether a district court may make the determination of entitlement. In *Cheng v. GAF*, 713 F.2d 886, 892 (2d Cir. 1983), *vacated & remanded on other grounds*, ____ U.S. ____, 105 S.Ct. 3493, 87 L.Ed.2d 626 (1985), we stated that "[a] rule permitting a

district court to sanction [a party] for appealing an adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court decision." More recently, in *Argo Marine Systems, Inc. v. Camar Corp.*, 755 F.2d 1006, 1015 (2d Cir. 1985), we stated that "the determination of whether or not to impose [attorneys' fees for a frivolous appeal] is reserved to the discretion of the Court."

Cheng and *Argo Marine Systems* recognize that we, not the district court that rendered the initial decision, should be the judges of whether an appeal is so frivolous as to warrant the imposition of attorneys' fees. If appellees felt that the State's earlier appeal warranted such a sanction, it should have sought relief from us at the time of that appeal. If we had found attorneys' fees appropriate, we could have remanded to the district court for calculation. However, as appellees did not seek relief at that time and we did not consider the issue, we reverse the award of fees for the appeal.

C. *Calculation of Fees*

The State also argues that the district court's calculation of fees is defective. We agree with the State's claim that the case must be remanded for reconsideration.

First, although the district court indicated that it believed that the hourly rates charged by appellees' attorneys were reasonable, there is no indication that these rates were compared with rates "charged for similar work by attorneys of like skill in the area." *Cohen*, 638 F.2d at 506. Such a comparison "should have been the starting point for determination of a reasonable award." *Id.* In addition, the court did not determine that the hours spent on fisheries issues were reasonable and not redundant. *Cf. Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983); *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984). Such a determination helps to ensure that the fees awarded only compensate for the expenses necessary to counter the bad faith. *Cf. Browning Debenture Holders'*, 560 F.2d at 1088-89.

However, we reject the State's claim that our decision in *New York State Association For Retarded Children v. Carey*,

711 F.2d 1136 (2d Cir. 1983), requires that the award of fees be disallowed for failure to submit contemporaneous time records. The work done for appellees preceded our decision in *Carey*, which by its express terms had only prospective effect. *Id.* at 1154. Appellees provided the district court with "a detailed description of the work carried out and the hours spent on the fisheries issue." *Sierra Club III*, 590 F.Supp. at 1527. This description showed separately the work done for the two trials. *Id.* As appellees' application was not governed by *Carey*, these records are adequate.[7]

In sum, we remand to the district court for a recalculation of the fee award along the lines we have indicated. However, in doing so, further evidence need not be received unless the district court feels that such evidence is necessary in order to fulfill our mandate.

D. *EAJA*

Appellees cross-appeal the district court's refusal to award fees under the EAJA. The EAJA allows a prevailing "party" in a civil action against the United States to recover its fees unless the court finds that the litigation position of the United States was "substantially justified." 28 U.S.C. § 2412(d) (1982). The term "party" is defined, *inter alia*, as a person whose net worth was less than $1 million at the time the action was commenced. *Id.* at § 2412(d)(2)(B).

The district court found that all of the conditions for an award under the EAJA were satisfied except that one of the non-applicant plaintiffs[8] had a net worth exceeding $1 million.

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7 We reject appellees' claim that the district court erred in failing to award fees on non-fisheries issues and in failing to award fees for time spent on the fee application. There was no finding of bad faith on the part of the State, the Corps or FHWA with respect to non-fisheries issues. Thus, there was no reason to award fees for those issues. Indeed, given appellees' initial scattergun approach to this lawsuit, they should be satisfied that fees were not awarded against them on some of the non-fisheries issues. With respect to the refusal to award fees for the fee application, we see no abuse of discretion on the district court's part.

8 Not all of the plaintiffs joined in the fee application, *see* note 1, *supra*.

Attributing this plaintiff's ineligibility to all plaintiffs, the court denied the request for fees under the EAJA, stating: "It would appear to be reasonable to consider plaintiffs together for the sake of applying [section 2412(d)(2)(B)]. Since one of the plaintiffs has a net worth over $1,000,000, recovery is precluded under 28 U.S.C. § 2412(d)." 590 F.Supp. at 1526. Appellees challenge this reading of the statute.

As an initial matter, the entire panel agrees with the district court that all other conditions for an award are satisfied. Unlike an award of fees under the bad faith exception, no improper motive need be shown to recover under the EAJA. All that is at issue is whether the government's actions were substantially justified. The government, which bears the burden of proving this, must show that its case was reasonable, *i.e.*, that it had a reasonable basis in both law and fact. *See Dubose v. Pierce*, 761 F.2d 913, 917-18 (2d Cir. 1985). As we explained earlier, the claims made by the Corps and FHWA were not reasonable.

The district court noted that the only issue is whether one plaintiff's ineligibility under the EAJA should be attributed to all plaintiffs. The statute is silent on this point and there is no case law directly on point. Appellees claim that the statute should be read so that only the status of the applicants is considered when determining eligibility for fees. The Corps, naturally, agrees with the district court's position that the court should look beyond the applicants to all of the plaintiffs and that if one plaintiff is ineligible, they are all ineligible.

Judge Oakes and Judge Kearse believe that a point midway between the two extremes advanced by the parties should be adopted. They believe that in determining eligibility, a court must look beyond the applicants to all of the plaintiffs. The court must then determine the number of eligible plaintiffs and award fees based on the ratio of eligible plaintiffs to total plaintiffs, here eleven to twelve. This result is supported by *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584 (3d Cir. 1984). In *Citizens Council*, the court found that two of the four plaintiffs were ineligible for fees. Yet, that court remanded the case for a determination as to the fees the two

eligible plaintiffs were entitled to recover. 741 F.2d at 598. Thus, the majority holds that the district court's conclusion that appellees are not entitled to recover under the EAJA is reversed. The case is remanded to the court for a determination of fees recoverable under the EAJA in accordance with the majority view.

I dissent from the majority's construction of the EAJA and would affirm the district court's decision on this point. The EAJA, as a waiver of sovereign immunity, must be strictly construed and not enlarged beyond what a fair reading of the language requires. *See Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685-86, 103 S.Ct. 3274, 3277, 77 L.Ed.2d 938 (1983); *Lauritzen v. Lehman*, 736 F.2d 550, 555-56 (9th Cir. 1984). I believe that the majority's reading of the statute enlarges it beyond what a fair reading requires.

The statute itself is silent on the point in question. However, I believe that the statute's policy supports the district court's interpretation. The EAJA was passed for a specific purpose; to ensure that parties would not be prevented from contesting government action simply because they could not afford to litigate the matter. *See, e.g., Boudin v. Thomas*, 732 F.2d 1107, 1112-13 (2d Cir. 1984); *Citizens Council*, 741 F.2d at 589-90. When a group of twelve plaintiffs, one of whom has a net worth of over $1 million, join together, congressional concern about access to the courts is not implicated. Indeed, it seems incongruous to hold that if the ineligible plaintiff alone challenged Westway, fees could not be awarded under the EAJA, but because the ineligible plaintiff was joined by less wealthy friends, fees may be awarded. Thus, strictly construing the statute in light of its purpose, I would affirm the district court's decision that appellees may not recover fees under the EAJA.

CONCLUSION

In sum, we affirm the district court's finding that the State's bad faith justifies a shifting of fees under the bad faith exception to the American Rule. We reverse the award of fees

based on the State's appeal of the merits of the district court's rulings. We reverse the court's finding that the Corps acted in bad faith. We reverse the court's holding that appellees, cross-appellants are ineligible for a recovery of fees under the EAJA. Finally, we remand the case for reconsideration and adequate explanation of the fees awarded against the State and for computation of fees against the Corps and FHWA under the EAJA. The parties shall bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

June 27, 1984

No. 81 Civ. 3000

SIERRA CLUB, The City Club of New York, Business for Mass Transit, Committee for Better Transit, Inc., NYC Clean Air Campaign, Inc., West 12th Street Block Association, Hudson River Fishermen's Association, Hudson County Citizens for Clean Air, Seymour Durst, Otis Burger, Mary Rowe, and Howard Singer,

Plaintiffs,

—v.—

UNITED STATES ARMY CORPS OF ENGINEERS, John Marsh, as Secretary of the Army of the United States, Joseph K. Bratton, as Chief of Engineers, Walter M. Smith, Jr., as New York District Engineer of the United States Army Corps of Engineers, William C. Hennessy, as Commissioner of the New York State Department of Transportation, United States Department of Transportation, Andrew L. Lewis, Jr., as Secretary of Transportation, of the United States, Federal Highway Administration, Raymond A. Barnhart as Administrator of the Federal Highway Administration, The City of New York,

Defendants,

and

CITY OF NEW YORK,

Defendant-Intervenor.

Butzel & Kass by Albert K. Butzel, Mitchell S. Bernard, New York City, *for Plaintiffs.*

Rudolph W. Giuliani, U.S. Atty. by Howard Wilson, Marc H. Rosenbaum, New York City, *for Federal Defendants.*

Kaye, Scholer, Fierman, Hays & Handler by Paul J. Curran, Thomas A. Smart, Kelley J. Newton, New York City, *for State Defendant-Intervenor.*

OPINION

GRIESA, *District Judge.*

Plaintiffs have applied for an award of attorneys' fees and disbursements.[1] The application is made against all defendants except the defendant-intervenor, City of New York.

Defendants fall into three categories—(1) the United States Army Corps of Engineers and certain officials connected with the Corps; (2) the Federal Highway Administration, the United States Department of Transportation and certain officials connected with those agencies; and (3) William C. Hennessy, who was Commissioner of the New York State Department of Transportation at the relevant times. These groups of defendants will sometimes be referred to as the "Corps defendants," the "FHWA defendants," and the "State defendant."

Plaintiffs assert two grounds for the award they seek.

> *First*, plaintiffs seek to recover against all defendants under the common law. In connection with the federal defendants, plaintiffs rely upon a provision of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(b), which in effect waives sovereign immunity as to the United States and its agencies and officials in an application for attorneys' fees and expenses under the common law.
>
> *Second*, they seek to recover against the Corps defendants and the FHWA defendants under another provision of the EAJA, 28 U.S.C. § 2412(d), which allows recovery of attorneys' fees and other expenses by a prevailing party

1 The application is actually made on behalf of four of the twelve plaintiffs. Apparently only these four have made any payments of fees or disbursements to plaintiffs' attorneys.

against the United States in a civil action, other than a tort action, unless the court finds that the position of the United States "was substantially justified or that special circumstances make an award unjust."

Summary of Rulings

The court concludes that plaintiffs are entitled to recover certain amounts for attorneys' fees and disbursements under the common law. As will be explained, certain issues were tried and appealed regarding which the defendants who were involved had no colorable basis for their positions. Attorneys' fees are awarded in the amount of $261,205 plus disbursements of $29,049, or a total of $290,254. This entire amount is assessed against the State defendants. However, for reasons to be described, the various federal defendants are only liable for part of this sum. The Corps defendants are liable for $155,870 fees and $21,245 disbursements, or a total of $177,115. The FHWA defendants are liable for $76,335 fees plus $5,004 disbursements, or a total of $81,339.

Plaintiffs' application under 28 U.S.C. § 2412(d) is denied. Although plaintiffs were prevailing parties on the major issue in the litigation and the court finds that on this issue the positions of the federal defendants were not substantially justified, it appears that plaintiffs include a person whose net worth exceeds $1,000,000. Therefore, recovery under this statutory provision is precluded by 28 U.S.C. § 2412(d)(2)(B).

The Proceedings

The relevant proceedings in this litigation are described in the following opinions: *Action for Rational Transit v. West Side Highway Project*, 536 F.Supp. 1225 (S.D.N.Y. 1982); *Sierra Club v. United States Army Corps of Engineers*, 541 F.Supp. 1367 (S.D.N.Y. 1982); *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983).

The first of the above captions was handed down on March 31, 1982. This opinion actually dealt with two actions, *Action for Rational Transit v. West Side Highway Project*, and *Sierra*

Club v. United States Army Corps of Engineers. Part of the opinion contained rulings dismissing the *Action for Rational Transit* case on motion. The present fee application does not relate to that action or these rulings.

The March 31, 1982 opinion also dealt with the *Sierra Club* action, in which the present fee application is made. That opinion confirmed that a number of the claims made by plaintiffs had been dismissed on motion. However, a trial ("the first trial") had been held on plaintiffs' claim regarding alleged violations of law by the Corps defendants and the State defendant in regard to the impact of Westway on fisheries and the alleged improper grant of a landfill permit by the Corps to the State. In the March 31, 1982 opinion the court nullified the landfill permit subject to further administrative proceedings.

There was a second trial dealing with the fisheries issues as they related to funding approvals granted by FHWA to the State. The June 30, 1982 opinion nullified the basic funding approvals, again subject to further administrative proceedings.

The various parties appealed and cross-appealed. The Corps defendants and the FHWA defendants did not appeal from the basic rulings of the district court on the merits, although they appealed in respect to certain terms of the judgments. The State defendant appealed on the merits. The Court of Appeals affirmed the district court decision in all essential respects as to the merits, although it reversed on certain of the points related to the terms of the judgments.[2]

Plaintiffs' application for attorneys' fees and disbursements was originally made on May 12, 1982. A number of events occurred which caused the decision on the fee motion to be deferred, including the second trial, the appeal, litigation in 1982 and 1983 regarding design and engineering activity during the further administrative proceedings, and unsuccessful efforts to resolve the fee application by settlement.

Moreover, in January of this year the court determined that the various papers submitted on the motion, while extensive,

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2 An injunction by the district court prohibiting federal reimbursement for acquisition of certain right-of-way was reversed in a separate opinion. *Sierra Club v. Hennessy*, 695 F.2d 643 (2d Cir. 1982).

did not satisfactorily address the issues. Consequently the court requested new briefs.

Legal Standard Under the Common Law

What is referred to as the normal American Rule is that the prevailing party in a litigation may not recover his attorneys' fees from the loser. Normally each litigant pays his own attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 245, 247, 257, 95 S.Ct. 1612, 1615, 1616, 1621, 44 L.Ed.2d 141 (1975). However, certain exceptions have been recognized. In *Vaughan v Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962), the Court held in an admiralty action that the libellant, the prevailing party, was entitled to recover counsel fees. The Court stated that such an award should be considered as part of the damages, since respondents had refused to honor an obligation to libellant which "was plainly owed him." The Court commented that respondents had been callous and recalcitrant in their approach to libellant's claim, had failed to investigate it, and had committed a willful and persistent default. *Id.* at 530-31, 82 S.Ct. at 999. In *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974), the Court stated:

> We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, . . .

Vaughan v. Atkinson, supra, was cited as authority for this proposition. The Supreme Court again discussed the various exceptions to the American Rule in *Alyeska, supra*, citing *Vaughan* and quoting the language from *F.D. Rich* about an award of attorneys' fees being proper where the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 421 U.S. at 258-59, 95 S.Ct. at 1622.

The "bad faith" exception to the American Rule can apply to either pre-litigation bad faith or to conduct in the course of the litigation. In *Hall v. Cole*, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702 (1973), the Court stated:

> It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.

It is obvious that bad faith conduct by a party prior to litigation may be part of a pattern of misconduct which carries forward into the litigation. However, it is the law that a party's bad faith, either prior to or during the litigation, may be the basis for an award of attorneys' fees under the common law rule. In the Second Circuit, *Class v. Norton*, 505 F.2d 123 (2d Cir. 1974), and *Stolberg v. Board of Trustees*, 474 F.2d 485 (2d Cir. 1973), were cases where the court awarded attorneys' fees to the successful plaintiffs on the ground that willful violations of obvious rights of the plaintiffs had required the bringing of unnecessary lawsuits. *See also Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14 (S.D.N.Y. 1980).

Certain leading Second Circuit decisions illustrate how the bad faith rule is applied to conduct occurring during litigation. In *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), the district court had awarded attorneys' fees to the defendant on the basis that the action was commenced in bad faith and also on the basis that the attorney for some of the plaintiffs had acted in bad faith in taking certain procedural steps during the litigation. The court of appeals reversed the award of fees on the basis of the improper commencement of the action, holding that, under the uncertain state of the law as it existed when the action was instituted, the claim was a colorable one. The court stated (p. 1088):

> An action is brought in bad faith when the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons.

However, the court held that the attorney's procedural bad faith might be the basis for a limited award of attorneys' fees, and remanded the case for specific findings on this issue.

In *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), the district court had been presented with a motion by the defendants to assess attorneys' fees against plaintiff and plaintiff's attorneys for bad faith commencement of the action and improper conduct during the litigation. The district court had assessed attorneys' fees on the first ground, but had made no finding regarding the second. The court of appeals reversed the award, holding that the action was commenced in good faith, and remanded the case to the district court for a determination of the propriety of the conduct of plaintiff and his attorneys during the litigation. The decision contains a discussion of the normal American Rule regarding attorneys' fees and the various exceptions, including the bad faith exception. The court stated:

> *Browning Debenture Holders', supra*, clarified the requirements for a finding of bad faith in this Circuit. We held that there must be "clear evidence" that the claims are "entirely without color *and* made for reasons of harassment or delay or for other improper purposes." 560 F.2d at 1088 (emphasis added). In the instant case we find it unnecessary to reach the question of the motives of Nemeroff or his counsel, for we hold that the claims were not "entirely without color" at the time the action was commenced.
>
> A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts actually *had been established*.

620 F.2d at 348. Upon remand, the district court held that, although the action was commenced in good faith, at a certain point it became clear that there was no colorable basis for the plaintiff's claims and that thereafter the suit was continued in bad faith. The district court also held that plaintiff's attorneys prosecuted the case in an intentionally dilatory fashion. The

court of appeals affirmed the attorneys' fee award on the first ground and did not reach the second ground. *Nemeroff v. Abelson*, 704 F.2d 652 (2d Cir. 1983).

It should be noted that the discussions by the Second Circuit regarding bad faith claims asserted by a plaintiff have been applied to bad faith defenses asserted by a defendant. *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14 (S.D.N.Y. 1980).

In the present case, plaintiffs contend that they are entitled to an award of attorneys' fees against all defendants under the above authorities. They do not contend that the Corps defendants were guilty of pre-litigation bad faith, but they do make such a contention against the FHWA defendants and the State defendant. Plaintiffs claim that all defendants acted in bad faith in the litigation.

Although the ensuing discussion will cover events both before and during the litigation, it is necessary to start with a description of the issues raised by the parties in the litigation.

Factual Findings on Common Law Claim

The present suit was commenced in March 1981. It was originally brought against the Corps defendants and the State defendant. Plaintiffs claimed that the Corps had failed to issue a proper environmental impact statement ("EIS") in connection with the State's landfill application for Westway, that the Corps had failed to give due consideration to environmental factors, and that the issuance of the landfill permit was not in compliance with the law. Plaintiffs raised the fisheries issue as well as a number of other issues. All the non-fisheries claims were dismissed on motion in November 1981. However, it was determined that a trial would be necessary on the fisheries issue.

On the latter issue, plaintiffs' case rested largely upon the alleged inadequacy of an EIS which had been issued by FHWA and the New York State Department of Transportation ("NYSDOT") in January 1977. This EIS had been relied upon by the Corps to fulfill its responsibility under the National Environ-

mental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* The January 1977 EIS and an accompanying water quality report had described the proposed landfill area, known as the interpier area, as "biologically impoverished" and as a "biological wasteland." These documents indicated that there was no fish life of any significance in the interpier area. Plaintiffs claimed that these descriptions were incorrect and that indeed, prior to issuing the landfill permit, the Corps had obtained the results of a fish study, conducted by Lawlor Matusky & Skelly at the behest of the State in 1979-80 ("LMS study"), which showed that the interpier area was a habitat for a variety of fish, particularly young striped bass. Plaintiffs claimed that the Corps violated NEPA in failing to issue a Supplemental Environmental Impact Statement ("SEIS"). Plaintiffs further claimed that, in considering the landfill permit application, the Corps gave no proper consideration to the fisheries information.

For purposes of analysis, it must be borne in mind that, in connection with the landfill permit application, the Corp's responsibilities included compliance with two statutes—*i.e.*, NEPA and section 404 of the Clean Water Act, 33 U.S.C. § 1344. As stated, the EIS obligation arose under NEPA. The Clean Water Act required the Corps to give notice of the landfill permit application, hold hearings, make its assessment of the impacts of the project in relation to the public interest, and create a reasoned administrative record for its decision. *See* 701 F.2d at 1031-33.

At the trial, the Corps conceded that the LMS study had produced different information from what was contained in the January 1977 EIS. However, the Corps defendants took the position that the LMS study had not altered the *conclusion* of the January 1977 EIS—*i.e.*, that the landfill would not have a significant impact on the *overall* striped bass resources of the Hudson River. On this basis, according to the Corps defendants, the Corps made a valid exercise of discretion in deciding not to issue an SEIS. Also, the Corps defendants took the position at trial that the Corps had properly considered the fisheries issue, including the LMS data, in connection with its

public interest review under the Clean Water Act. The Corps defendants' Trial Memorandum of January 15, 1982 summarized their argument (p. 2):

> The Army Corps expressly and carefully addressed the very issue now relied upon by the plaintiffs as their last remaining challenge to the Westway project [the fisheries issue]. The Corps, after considering the LMS study, which specifically addresses the issue of striped bass overwintering,* as well as the comments of NMFS, FWS and EPA and members of the public . . . concluded that there would not be a significant impact on the overall striped bass resources of the Hudson River.

The asterisk in the above quotation referred to the following footnote:

> Volume I of the LMS study, at page 4.0-17, concludes that:
>
> For the striped bass population, the project area appears to represent one of many available habitats that various portions of the population occupy during the winter months in years when temperatures are mild and conditions are favorable.

At a later point the Trial Memorandum stated (p. 9):

> In this case it is beyond question that the Army Corps squarely considered the factors relevant to its decision on whether to supplement. Those factors included the intensity of striped bass overwintering in the winter of 1979-80, and the availability of other habitats. Moreover, the Corps submits that it was fully correct in its conclusions regarding the availability of other habitat, and most certainly did not make the "clear error of judgment" which alone could justify this Court in concluding that the Corps was arbitrary or capricious.

The State defendant made basically the same defense—*i.e.*, that the LMS data did not alter the conclusion reached in the

EIS about the effect of the landfill on overall Hudson River productivity. Pretrial Memorandum pp. 10-11. The State defendant also relied heavily on the conclusion of the LMS report that the interpier area is one of "many available habitats" for the overwintering of striped bass. Pretrial Memorandum p. 6.

The first trial took place January 19 to February 1, 1982. Before discussing the evidence at that trial, the events leading to the second trial will be summarized.

The March 31, 1982 opinion contained extensive findings to the effect that the data developed in the LMS study of 1979-80 so seriously undercut what had been stated in the January 1977 EIS about the absence of fish life in the interpier area that it was improper for the Corps not to issue an SEIS. The court further found that the Corps failed to give due consideration to the fisheries data in connection with its public interest review. Since the FHWA defendants had not yet been brought into the action, there were no findings of violation of law as to those defendants. However, the March 31, 1982 opinion had obvious implications as to FHWA, which had signed the January 1977 EIS. The court noted in the opinion that there would need to be consideration as to whether the injunction to be entered should cover FHWA. 536 F.Supp. at 1229.

Subsequently, the complaint was amended to include the FHWA defendants. Plaintiffs announced that they would rest on the existing record in connection with their claims against FHWA. However, the FHWA defendants asserted that there were new issues requiring trial, and the State defendant agreed.

The FHWA defendants set forth their defenses in an Offer of Proof dated May 11, 1982. They asserted basically the same defense which had been posed by the Corps defendants in the first trial—*i.e.*, that the LMS data did not change the conclusion in the January 1977 EIS that the landfill would not significantly damage Hudson River fisheries. The State defendant took the same position. It may well seem puzzling that these defendants pressed the very contention which had been rejected by the court following the first trial. However, the FHWA defendants and the State defendant urged that arguments about the conduct of FHWA and its funding approvals were not precluded by the findings as to the Corps.

Following the second trial, the court issued its June 30, 1982 opinion, which found that FHWA had violated NEPA in respect to the fisheries issue, and that misconduct on the part of the State had contributed to this violation.

We now come to the specific question presented by plaintiffs' application for attorneys' fees. This question is not whether defendants were wrong on the merits, but whether their defenses were asserted in bad faith within the meaning of the authorities cited above. Were these defenses "entirely without color and made for reasons of harassment or delay or for other improper purposes"? Or did the defenses have "some legal and factual support, considered in light of the reasonable beliefs" of the parties posing them?

A circumstance should be noted here, which is obvious but nevertheless important to bear in mind. By the time the defense positions were laid out, the various defendants were in full command of the relevant facts. The Corps defendants and their counsel knew exactly what they had done and had not done in connection with the Westway matter. The same is true for the FHWA defendants and the State defendant. Each group of defendants was in a position, prior to the commencement of the trial involving the particular defendants, to know positively whether the defenses asserted had a reasonable degree of merit or not.

The First Trial

As described earlier, the first trial involved the issue under NEPA as to whether the Corps had made a valid exercise of discretion in not issuing an SEIS, particularly in view of the LMS data. There was also the issue under the Clean Water Act as to whether the Corps adequately considered the fisheries issue in its public interest review. Although the trial focused to a large extent upon the processes of the Corps, the State defendant was intimately involved with the issues and was, of course, critically interested in the outcome, since plaintiffs were seeking to void the landfill permit granted by the Corps to the State.

In considering the materials set forth below it is well to keep in mind the position of the Corps that it "expressly and carefully addressed" the fisheries issues, and that it "squarely considered" the relevant fisheries factors in "its decision on whether to supplement." Another argument central to the position of all defendants throughout both trials was that despite the new *information* presented by the LMS report, which contradicted the factual description in the January 1977 EIS, nevertheless the LMS data did not change the *conclusion* of the January 1977 EIS that the landfill would have little impact on the overall productivity of the Hudson River.

The following is a summary of the pertinent evidence at the first trial, and the findings of the district court and the court of appeals.

The landfill application was before the district engineer (the first of the three tiers of review in the Corps) for 2½ years—from April 1977 until September 1979. The Corps announced in April 1977 that the January 1977 EIS, which had been issued by FHWA and NYSDOT, would be regarded as adequate for the purposes of the Corps. 701 F.2d at 1021. Soon after this, the district engineer commenced receiving objections to the granting of the landfill permit from the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS"), and received a request from the Environmental Protection Agency ("EPA") to conduct a more thorough study regarding fisheries. The district engineer passed these comments on to NYSDOT. However, the district engineer took no action to make any study of fish life in the interpier area.

EPA prevailed upon NYSDOT to have such a study performed, and the result was the LMS study. The work by LMS was carried out from April 1979 to April 1980. In September 1979, without waiting for the LMS study to be completed, the district engineer recommended that the landfill permit be issued. In connection with the fisheries question, the district engineer's report merely reiterated the material contained in the January 1977 EIS. The report noted the ongoing study being made by LMS, but concluded that the information from this study would not be necessary for decision on the Westway

landfill matter. The district engineer made the specific finding that no SEIS was required.

The evidence at the first trial was "a virtual blank" as to what the district engineer and his staff did by way of consideration of the critical issues. 536 F.Supp. at 1241. The district engineer did not testify.

There was no colorable basis for any claim that the district engineer "expressly and carefully addressed" the fisheries issues, or that he in any way fulfilled the obligations imposed by NEPA and the Clean Water Act.

From September 1979 until January 1981 the Westway landfill application was before the division engineer. This was an important phase of the proceedings, since the LMS report was received by the Corps in September 1980. The net result of the various events which occurred during this period of time was that the division engineer declined to issue an SEIS (although requested to do so by EPA and also by the Sierra Club) and recommended issuance of the landfill permit.

The court of appeals quoted with approval from the March 31, 1982 district court opinion:

> The most significant environmental impact requiring consideration by the Corps of Engineers was the impact of the proposed landfill on fishery resources.
>
> . . . . .
>
> After the [Lawler] report was obtained, at the instance of the other agencies, the invalidity of the conclusions in the January 1977 EIS regarding aquatic impact was proved. The interpier area was shown to be a highly significant and productive habitat for fish, including striped bass.

701 F.2d at 1024-25. The court of appeals added its own finding, in comparing the decision of the division engineer with that of the district engineer:

> The division engineer's decision was at least equally flawed. By the time that decision was rendered, the Lawler report had been received, and it confirmed the criticisms of the objecting federal agencies and revealed

> the inaccuracy of the FEIS's conclusion that the interpier area was a biological-wasteland. Nonetheless, the division engineer, like the district engineer, merely forwarded all federal agency criticisms of the FEIS to NYSDOT and FHWA, and had no independent Corps study made of the questions raised.[3]

701 F.2d at 1032.

Again, the question is not whether the Corps won the case on the merits (which it obviously did not), but whether the position of the Corps was so wholly lacking in merit that it could not be asserted in good faith. This brings us back to the contention of the Corps that it expressly, carefully and squarely reviewed the fisheries issues, and that such review was the basis of its decision, or exercise of discretion, in not issuing an SEIS, and also the basis of the decision to grant the landfill permit.

As far as the administrative record is concerned, there is an absolute void as to any indication that the division engineer made this kind of reasoned consideration or decision or exercise of discretion. The recommendation of the division engineer was contained in a report dated January 16, 1981. This report avoided any discussion of the LMS striped bass data and the magnitude of the findings of striped bass in the interpier area. This recommendation was preceded by a staff report prepared in the division office in November 1980. The staff report was similarly blank on the subject of the striped bass and the issues raised by the LMS report. 536 F.Supp. at 1250-51.

As to testimony, there was none from the division engineer, nor was there any testimony by any member of his "Westway Committee." Instead, the Corps called two biologists who had participated in the Westway matter at the division level—Linda Monte and Robert Pierce. Monte was the junior of the two. She had been employed by the district engineer while the Westway application was in the district office, and was as-

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3 The court of appeals referred to the January 1977 EIS as the "FEIS"—Final Environmental Impact Statement.

signed to the division in November 1979. She worked on the Westway matter until she took maternity leave in November 1980. She drafted the material regarding aquatic impacts in the November 1980 staff report and in the January 16, 1981 division engineer's report.

Monte's testimony is remarkably lacking in content. She met at times with General Lewis, the division engineer, and at times there were meetings involving Lewis, Pierce and Monte. No notes or records were kept of those meetings. Monte testified that Lewis was "very thorough . . . very interested" in the Westway project, and that he received briefings on the fisheries issue (Tr. 1133-34). After the LMS report arrived, Lewis, Pierce and Monte "discussed all of the fish that were using that area, and that included the striped bass" (Tr. 1138). They discussed "all of the parameters in the LMS Report" (Tr. 1146). On cross-examination Monte was asked what was said in these discussions of "all the fish" and "all of the parameters." Her answers did not show any discussions of substance on the critical issues. For instance, she did not recall any detailed discussion of the problems of overwintering striped bass (Tr. 1220-22).

Monte could not recall whether she did or did not make a recommendation on the question of whether to issue an SEIS (Tr. 1186).

It is true that Monte testified that she made an "impact analysis," and did not find that, based on the information received, the elimination of the interpier area would affect the Hudson River fisheries in an "unacceptable manner." She believed that the impact of the project would be "minor" (Tr. 1186). She further testified that "we" (meaning herself, Pierce and Lewis) "concluded that it wouldn't have an unacceptable impact on the fisheries of the Hudson River" (Tr. 1146). *See also* Tr. 1231-32. The trouble is that there is no evidence whatever that these conclusions were based on anything like a detailed and systematic analysis. There is no evidence that Monte was even assigned to make such an analysis. For instance, Monte testified that she believed that there were adequate areas in the Hudson River, apart from the interpier

area, where the young striped bass could overwinter (Tr. 1150, 1201-2, 1214). This belief was the foundation for her conclusion that the landfill would cause only a minor impact. However, Monte did not do any statistical analysis to arrive at her belief. She did not even take the LMS data and try to compare the contribution of the interpier area as a habitat with the rest of the estuary (Tr. 1222-23).

Monte testified that, in addition to the LMS data, the Corps had certain other information about striped bass habitats in the Hudson River. However, the figures in these other sources of information could not be compared directly with the LMS data, and this other material merely gave an "overall impression" (Tr. 1202). Moreover, even in connection with this overall impression, Monte did not actually look at the sources (Tr. 1229).

Pierce's testimony was even less supportive of the position of the division engineer. He was a biologist in the division office, and was a consultant to the Westway Committee and to Lewis. He came to the conclusion that the techniques used in arriving at the presentation in the January 1977 EIS were faulty (Tr. 1240). At some point, (presumably as a result of the LMS data) Pierce concluded that the interpier area played a normal role as part of the Hudson River estuary in the production of fish, and he so advised Lewis (Tr. 1246). Pierce expressed to Lewis a concern as to what the loss of the interpier area would do to the "carrying capacity" of the Hudson River in regard to fish production, and recommended to Lewis that the Westway landfill permit be denied (Tr. 1247-48).

However, Pierce was not assigned to make any detailed analysis of the LMS findings. He was not asked to undertake any professional assignment with regard to the striped bass. It was Monte, and not Pierce, who drafted the sections of the staff report and the division engineer's recommendation regarding fisheries.

Pierce testified as to no discussions or considerations on the question of whether to issue an SEIS.

After the division engineer had made his recommendation, the Westway matter went to the chief of engineers. Neither the chief, nor the assistant who worked with him on the matter, testified at the trial. A biologist in the chief's office, Dr. Hall, testified that he had reviewed the matter and had written a memorandum commenting on the "significance of the [interpier] area as habitat" for striped bass. There is no evidence that the chief of engineers consulted with Hall or did anything other than rely upon the recommendation of the division engineer.

The court of appeals quoted with approval the finding of the district court that, "The total failure of the Corps to comply with [its] obligations has been demonstrated beyond any question." 701 F.2d at 1011. The court of appeals also noted the "surprising dearth of evidence as to the nature and substance of the Corps's investigations and deliberations." *Id.* The court specifically commented on the failure of any of the responsible Corps officials to testify. *Id.*

Under all of the circumstances, it must be concluded that there was no basis for saying that the Corps "expressly and carefully addressed" the fisheries issue vis a vis its statutory obligations. There was no testimony whatever in the first trial as to any deliberation or any exercise of discretion or the making of any decision on the question of whether to issue an SEIS to correct the misinformation contained in the January 1977 EIS.

Both the Corps defendants and the State defendant argued at the trial that the Corps was entitled to rest on the January 1977 EIS and not issue an SEIS, because the LMS data did not change the *conclusion* that overall Hudson River fish productivity would not be harmed. However, no witness from the Corps ever testified as to this line of reasoning. One can well understand why.

In the first place, the argument is based on a fallacious legal premise. We are not talking about an uncertain area of the law or a novel legal proposition. We are dealing with a clear and well-settled requirement under NEPA. If a proposed project will result in the destruction of a significant amount of forest

or park land or wetlands or fisheries habitat, then that *information* must be stated in the EIS; it is not sufficient to merely state someone's *conclusion* that the overall forestry or park or wetlands or fishery environment in some broad area will not be unduly affected. A reading of the court of appeals opinion in the present case is sufficient to show that the requirement of NEPA is for the disclosure of relevant *information*. 701 F.2d at 1029-30. Of course, the January 1977 EIS provided what was represented to be correct information as a back-up to its conclusion regarding aquatic impact. When that information was proven to be wrong (not in some small detail but grossly wrong), the law required the Corps to supplement and correct the misinformation. The applicable regulation governing supplementation provides that an SEIS should be prepared where there are "significant new circumstances or information relevant to environmental concerns . . . ." 40 C.F.R. § 1502.9 (c)(1)(ii).

Thus there was no basis whatever for the argument that the Corps's NEPA obligation related solely to some alleged conclusion regarding overall Hudson River productivity.

Even from a factual standpoint, the purported conclusion had some serious problems. Its basis was said to be the language in the LMS report, quoted in the Corps defendants' Trial Memorandum as described above, that the interpier area "represents one of many available habitats" for striped bass. LMS Report p. 4.0-17.

In the March 31, 1982 opinion, the court found that the LMS report had two aspects. *First*, the report was sufficient to apprise the Corps of the significance of the interpier area as a striped bass habitat, as demonstrated by, among other things, the memorandum of Corps biologist Hall specifically referring to "the significance of the area as habitat." 536 F.Supp. at 1247. *Second*, some phases of the LMS study were misleading and attempted to avoid the full impact of the facts revealed in the study. Specifically, the conclusion about "one of many available habitats" was misleading because it attempted to give the impression that the interpier area was one of many habitats more-or-less equal in importance and productivity, whereas the

data gathered by LMS showed that, except for a New Jersey site across the river, the abundance of striped bass found in the interpier area was enormously greater than that found in any other location sampled. 536 F.Supp. at 1247-48. The court of appeals found that the LMS data were not fully disclosed in the LMS *report*, and that the Westway Project[4] officials knew this, although the Corps may *not* have known of this at the time. 701 F.2d at 1023 n. 12 and 1046-47.

In this connection the court of appeals was dealing with the issue of whether the parties were in bad faith at the time of the events in question.[5] However, by the time of the first trial all the parties and their attorneys had been able to analyze the LMS report and its conclusions fully. There is little excuse for defendants putting forth the conclusion about striped bass in the LMS report as representing a scientific judgment upon which they were entitled to rest their position. Moreover, as the court of appeals specifically found, the State's representatives had known of the misleading nature of the LMS report from the start.

In any event, despite differences in the degrees of knowledge of the Corps and the State at the time of the events, the Corps possessed a sufficient body of information from the LMS study so that it knew or, with the slightest bona fide consideration, should have known that there was "significant . . . information" within the meaning of the applicable regulation, which required the issuance of an SEIS. No one from the Corps came to the witness stand and testified, "I considered the LMS report and decided that it was not significant information." Such testimony would have been outlandish. Indeed, the only way defendants were able to give the appearance of having a valid defense was to phrase the issue in a way that veered off from the law and to make use of a spurious "conclusion" in the LMS report.

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4 There was an administrative entity called the "Westside Highway Project" (referred to in the various opinions as "the Westway Project" or "the Project") under the jurisdiction of NYSDOT.

5 This issue arose in the court of appeals' review of the district court's appointment of a special master. The appointment was reversed.

The court concludes that the defenses asserted by the Corps defendants and the State defendant at the first trial were entirely without color. The positions asserted by defendants were ones which they totally failed to support in law and in fact. As to the motives of defendants (*see Nemeroff v. Abelson*, 620 F.2d at 348), it must be concluded that the defenses were asserted for an improper purpose. To occupy one's opponents and the court in meritless and fruitless litigation is an illegitimate endeavor for which there is no proper purpose.[6]

The Second Trial

As described earlier, the second trial resulted from the fact that, following the March 31, 1982 opinion, the complaint was amended to bring in the FHWA defendants. Plaintiffs claimed that the January 1977 EIS, signed by NYSDOT and FHWA, was inadequate, in regard to fisheries, when issued, and that in any event the LMS data made it necessary for FHWA to issue an SEIS.

In connection with the present fee application, the FHWA defendants and the State defendant assert that no second trial would have been necessary if plaintiffs had included the FHWA defendants in their original complaint, and that they should have done so.

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6 At the end of the first trial I remarked that I thought that there was "an honest conflict" and that the witnesses had been "remarkably candid" (Tr. 1496). I have no reason to depart from my statement about the impression the witnesses made. However, the conclusions to be drawn from an analysis of their testimony are something else again. As to my statement about there being an "honest conflict," that impression was not, of course, a finding of fact, and it has obviously been superseded by the findings I have made upon an analysis of the evidence and the law. This process illustrates the fact that there may be cases in which, because of the subject matter or for other reasons, a party to a litigation can appear to create difficult issues, which require a considerable effort on the part of the court to deal with. However, there are times when, after all the arguments and the evidence are sorted out, it becomes apparent that there was no legitimate basis for certain claims or defenses and no bona fide reason for occupying the court with the matter. Such is the case here.

The court has voiced some criticism of plaintiffs for not including the FHWA defendants in the case from the outset. However, upon an analysis of the record, the court concludes that the total amount of trial time was not appreciably increased because there were two trials instead of one. Each trial involved different phases of the activities of the federal agencies and the State.

At the second trial plaintiffs rested on the record of the first trial. However, both the FHWA defendants and the State defendant presented an extensive case. In connection with the State's witnesses, it is necessary to note that the State had acted in Westway matters through NYSDOT, which had in turn acted largely through an administrative entity known as the "Westway Project" (see footnote 4). The Westway Project employed various consulting firms, the principal one of which was Systems Design Concept, Inc. ("Sydec"). The State called witnesses from NYSDOT itself and also from the Project and Sydec.

As to the question of the adequacy of the January 1977 EIS when issued, the district court found in its June 30, 1982 opinion that there was no basis for the conclusion put forth in the EIS and the accompanying water quality report that the interpier area was a "biological wasteland" and was "biologically impoverished," and found that the authors knew or should have known of the lack of factual basis. 541 F.Supp. at 1371-72. In affirming, the court of appeals referred to the "baseless and erroneous factual conclusion" of the January 1977 EIS, 701 F.2d at 1034, the "cavalier manner in which the Project had reached its conclusion" and the fact that there was "no evidence that FHWA made any independent evaluation whatever of the fisheries issues" in connection with the January 1977 EIS. *Id.* at 1031. *See also id.* at 1046.

However, the question of the effect of the later LMS data and whether this data required an SEIS was the subject of the bulk of the testimony offered by defendants at the second trial. Witnesses from FHWA and the State admitted that at least by the time of the receipt of the LMS data they knew that the conclusions presented in the January 1977 EIS were based on

faulty investigative techniques. 541 F.Supp. at 1371-72. The LMS data showed a wholly different set of facts from what was set forth in the flawed 1977 EIS. It is difficult to understand how there was even an arguable justification for FHWA and the State not issuing a corrective SEIS. However, the FHWA and State defendants put on a lengthy case at the second trial on this issue.

The character of the defense evidence on this subject is described in the June 30, 1982 opinion. The three principal defense witnesses were Graham Bailey, Area Engineer for FHWA; Lowell K. Bridwell, Executive Director of the Westway Project from 1972 to 1981; and Joan Walter, an employee of Sydec. The court described their testimony as follows:

> In connection with the three principal defense witnesses—Bailey, Bridwell and Walter—it is apparent that they have not disclosed the facts in a full and candid fashion. The testimony of these witnesses was characterized not only by a striking lack of plausibility on critical points, but also by a remarkable amount of inconsistency, evasion, and asserted loss of memory on matters where memory would be expected.

541 F.Supp. at 1372. The court of appeals had this description of the testimony of the FHWA witnesses:

> . . . faulty memories (perhaps conveniently blank, *see* 541 F.Supp. at 1372) . . .

701 F.2d at 1040-41.

The district court found that the LMS data, as gradually obtained by the Project and FHWA prior to the issuance of a report by LMS, was a matter of "acute concern," and that the Project and FHWA responded with a "plan to delay the issuance of the report by LMS, and to manipulate the presentation of this data in order to mask its full import." 541 F.Supp. at 1373. The court of appeals found that it was not so clear that FHWA joined in the scheme to delay, and that the attribution of "full knowledge and scheming in the early summer of 1980" to FHWA was contraindicated by other

evidence. 701 F.2d at 1046. However, the court of appeals stated that "the record amply supports the district court's findings of bad faith on the part of the Project and its officials," and that FHWA proceeded in bad faith after a meeting of August 20, 1980, at which time FHWA received the "complete picture" about the significance of the interpier area as a fish habitat from the Project and joined ranks with the Project in preventing disclosure. *Id.* at 1046-47.[7] The court of appeals stated:

> We also concur in the district court's inference that the Project's machinations to avoid disclosure of the Lawler data suggested that in the Project's view the data were highly significant rather than insignificant, and we agree that the same inference is permissible as to FHWA's assessment of the data in light of its joining ranks with the Project in preventing disclosure.

Id. at 1047.

The June 30, 1982 district court opinion contained a further discussion, in addition to what had been described in the March 31, 1982 opinion, regarding the misleading nature of the LMS report. For the sake of the present motion the following finding is significant:

> At the very least, the method of presentation in that report created a facade which could be used officially by

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7 The State defendant, in its papers on the present motion, attached a copy of certain materials relating to an investigation in the State of Maryland as to the conduct of Bridwell in the Westway matter. Bridwell is now Secretary of Transportation of Maryland. Among other things, the State defendant argues that a panel report and the Governor's report take a somewhat different view of the events at the August 20, 1980 meeting from what the district court found in the June 30, 1982 opinion. The Maryland materials are not a part of the record in the present case. If administrative investigation reports were to be considered, then it would be appropriate to include the June 1984 report of the State of New York Commission of Investigation entitled *The Westway Environmental Approval Process: The Dilution of State Authority.* However, it is the view of the court that the present motion must be decided solely on the basis of the court record.

> the Project, the FHWA and the Corps of Engineers to justify their various actions which are now in question. Moreover, the spurious conclusions in the LMS report about striped bass have been referred to over and over again by defendants and their witnesses in this litigation to support positions taken by them.

541 F.Supp. at 1378. The court of appeals agreed that the Project knew that the LMS data "were not fully disclosed in the Lawler report." 701 F.2d at 1023 n. 12 and 1047.

Another pivotal event focused on at the second trial was the October 9, 1980 letter from FHWA to the Corps. Previously the Corps had received certain comments from EPA and the Sierra Club to the effect that the January 1977 EIS was inadequate and that an SEIS should be issued. The Corps passed these on to FHWA for its views, which replied in the letter of October 9, 1980. This letter took the position that an SEIS was not necessary, that the LMS data did not lead to any different conclusion from what was in the 1977 EIS, and that the LMS data meant nothing more than—"fish use the area." The district court found that this statement, and the entire description relating to fisheries in the October 9, 1980 letter, were "simply fraudulent." 541 F.Supp. at 1379. The court of appeals referred to the letter as a "fraudulent characterization" and a "blatant misrepresentation." 701 F.2d at 1047.

There was evidence about the authorship of the October 9, 1980 letter, which the district court called "nothing short of bizarre." 541 F.Supp. at 1379-81. *See also* 701 F.2d at 1041. As a result of a surprisingly difficult inquiry, it was finally established that the relevant language in the letter was given by the Project to FHWA. 701 F.2d at 1047.

Of course, aside from advising the Corps about whether the Corps needed to issue an SEIS, FHWA needed to make a decision on this subject in order to meet its own statutory responsibility. Since FHWA had signed the January 1977 EIS jointly with NYSDOT, presumably there would be some coordination with the State on this subject. No authoritative person from either FHWA or the State testified that he either made the

decision not to issue an SEIS or recommended such a decision. The district court concluded that the decision was made in a manner none of the witnesses was willing to admit. 541 F.Supp. at 1379.

It is necessary now to determine what conclusions are to be drawn from the facts developed at the second trial. There is simply no escape from the conclusion that the authorized representatives of the State and FHWA engaged in bad faith conduct prior to the litigation. Moreover, it is the kind of conduct which is most germane to an application for attorneys' fees. Part of the activities of the State and FHWA consisted of an attempt to create a record of purported scientific judgment (*e.g.*, the misleading conclusion in the LMS report) and purported agency discretion (*e.g.*, the October 9, 1980 letter from FHWA to the Corps.[8]). It is perfectly obvious that the intention was to have this "record" available to forestall or rebut a challenge to the agency action. This is exactly the use that has been made of these materials. Defendants have relied heavily on them for their defense in this litigation.

To be perfectly clear on the question of pre-litigation bad faith, it should be repeated that both the district court and the court of appeals found bad faith on the part of the State during the entire time beginning with the receipt of the LMS data. The district court found bad faith on the part of FHWA beginning with the receipt of the LMS data. The court of appeals felt that the bad faith of FHWA started with a precise event—the August 20, 1980 meeting. This was, of course, prior to FHWA's October 9, 1980 letter.

As to the conduct of the FHWA defendants and the State defendant in the second trial, the court finds that the defenses they presented were entirely without color. By the time of this

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8 In addition, FHWA and NYSDOT issued a document entitled "Reevaluation" in 1981 purporting to review the question of whether to supplement the January 1977 EIS. Of course, the decision not to supplement was made in the summer and fall of 1980. The discussion in the Reevaluation followed the pattern of the earlier documents in presenting a wholly misleading discussion of the fisheries issue. 541 F.Supp. at 1382.

trial defendants knew that the fisheries material in the January 1977 EIS was not only false but had been based on a wholly inadequate investigation of the facts.

Of course, the main claim made by plaintiffs at the second trial was that, following the receipt of the LMS data, FHWA had a duty to issue an SEIS. Most of the evidence related to this issue. The attempt of both the FHWA defendants and the State defendant to present defenses on this issue was lacking in any colorable basis. Although defendants purported to come forward with authoritative witnesses, in contrast to the first trial, the results can only be described as disastrous.

We recognize that one of the main duties of a trier of the fact in a lawsuit is to assess the credibility of witnesses. Surely it would not be said that a claim or defense is entirely without color every time some testimony is found to be untrue.

But the credibility problems at the second trial went far beyond the usual or normal. They were extraordinary. At the beginning of the third day of the second trial, the court commented on the fact that the witnesses were not telling the facts, but were merely stating positions; that witnesses were skipping over large blocks of time and over important events. The court commented on a witness who was quite obviously following a "script" which he forgot, causing some difficulty in his further testimony. The court urged that the defense attorneys make every effort to see that witnesses obeyed the oath (Tr. 262-65). Unfortunately, the serious credibility problems continued, as the record amply demonstrates.

This abnormal and extraordinary situation regarding the lack of credibility of the defense witnesses reinforces the conclusion that, at the second trial, defendants asserted positions which lacked any reasonable basis.

The Appeal

The federal defendants did not appeal from the district court findings described above. However, the State defendant did appeal these findings. Plaintiffs claim that the State's appeal was without colorable basis.

The State defendant asserts that the district court cannot properly determine whether attorneys' fees should be awarded for the appeal, and that this question should be addressed to the court of appeals. However, *Perkins v. Standard Oil of California*, 399 U.S. 222, 90 S.Ct. 1989, 26 L.Ed.2d 534 (1970), is to the contrary.

In the present case, the State defendant's appeal from the district court findings on the fisheries issue was merely a further assertion of the baseless positions taken in the district court. It is appropriate to include an award for the appeal in the amount assessed against the State defendant.

Conclusions on Bad Faith Claim

For the foregoing reasons, the court concludes that plaintiffs are entitled to an award of attorneys' fees and disbursements against the Corps defendants and the State defendant for the assertion of bad faith defenses in the first trial. In connection with the second trial, the court concludes that plaintiffs are entitled to an award of attorneys' fees against the FHWA defendants and the State defendant because of their bad faith conduct both prior to and during the second trial. Plaintiffs are entitled to an award against the State defendant in connection with the appeal. These awards are limited to the fisheries issue.

Common Benefit Theory

Plaintiffs assert another ground under the common law. They contend that this case falls within the common benefit exception to the American Rule. Under this exception, a party is entitled to recover attorneys' fees where a suit confers a substantial benefit to members of an ascertainable class. Plaintiffs urge that the results of this litigation have benefited both the taxpayers of the State of New York and of the United States as a whole, and that an award of fees against the State and against the United States will operate to spread the cost of the litigation among all of these benefited persons. The common benefit rule does not apply to this case. The class must be

finite and identifiable, and the rule does not apply to situations where a plaintiff's action has simply vindicated a general social grievance. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-79, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267, 95 S.Ct. 1612, 1626, 44 L.Ed.2d 141 (1975).

Alternate EAJA Claim

Aside from the claims under the common law, plaintiffs seek attorneys' fees against the federal defendants under a provision of the EAJA which allows recovery of fees and other expenses to a prevailing party against the United States in a civil action, other than a tort action, unless the court finds that the position of the United States "was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d). This provision was repealed effective October 1, 1984, but applies to any action commenced before the date of repeal.

The term "party" in this provision is defined to mean, among other things, an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed. 28 U.S.C. § 2412(d)(2)(B).

The court finds that all of the conditions for an award under this provision are met, except that one of plaintiffs, Seymour Durst, has a net worth exceeding $1,000,000. Plaintiffs argue that Durst is not one of the plaintiffs making this application for fees. Only four of the twelve plaintiffs are making the application. *See* footnote 1. Also, it is asserted that there is an agreement with Durst not to bill him for any fee and disbursements.

However, Durst is a plaintiff. It would appear to be reasonable to consider plaintiffs together for the sake of applying this section of the statute. Since one of plaintiffs has a net worth over $1,000,000, recovery is precluded under 28 U.S.C. § 2412(d).

Eleventh Amendment Defense

The Eleventh Amendment to the United States Constitution provides that the judicial power of the United States does not

extend to any suit in law or equity against a state by citizens of another state. It has consistently been assumed that the sovereign immunity of a state also applies to bar a suit against a state by citizens of the same state. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

However, it has been held that this doctrine does not bar a suit in a federal court against a state official, acting in his official capacity, where the suit is for injunctive relief. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Also, if injunctive relief is granted against the state official and if there is ancillary monetary effect against the state treasury, the Eleventh Amendment will not act as a bar. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The Second Circuit has construed the latter doctrine to permit recovery of attorneys' fees when the award is incident to a judgment granting prospective injunctive relief. *See Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980).

The soundness of this rule is illustrated by the present case. Although the suit was brought to attack the Corps of Engineers' decision to grant the landfill permit, and later the FHWA's decision regarding funding, the State of New York had a crucial interest in the suit because it was the beneficiary of the federal decisions. It was appropriate, and undoubtedly necessary, for plaintiffs to join as a defendant the responsible State official, the Commissioner of Transportation. The State, through the Commissioner, took a most active role in the litigation in defending the landfill permit and the funding. There was never any question about the jurisdiction of the court over the Commissioner and the right of the Commissioner to participate in the case. However, the Commissioner was bound to observe the rules and standards of conduct applicable in a federal court. It necessarily follows that the Commissioner should be subject to sanctions, including the assessment of attorneys' fees and disbursements, for failure to observe these rules and standards.

The Punitive Damage Argument

The State defendant argues that recovery of attorneys' fees on the basis of a finding of bad faith is barred because such an award would in effect amount to a judgment for punitive damages.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), held that punitive damages may not be awarded against a municipality in an action under 42 U.S.C. § 1983. The court recognized that municipal immunity from punitive damages was a broadly applied doctrine. In the present case, the State defendant argues that this rule prevents him from being subject to an award of attorneys' fees.

The dispositive point is that a judgment for attorneys' fees based on bad faith is not the same as the imposition of punitive damages in a tort case. Such a judgment for fees arises from policies designed to protect the judicial process from abuse. Moreover, it has a compensatory character in respect to the services performed by the winning party's attorneys.

Amount of Award

As already described, plaintiffs' suit raised a number of issues in addition to the one concerning fisheries. The non-fisheries issues were disposed of on motion without trial in defendants' favor. Defendants clearly were not in bad faith on the non-fisheries issues. Plaintiffs' recovery of attorneys' fees and disbursements must be limited to the fisheries issue.

Plaintiffs' attorneys have provided a breakdown showing work on the fisheries issue, except in connection with the appeal. As to the appeal, it can be safely estimated that at least two-thirds of the time spent and of the disbursements related to the fisheries issue.

As to the work of plaintiffs' attorneys leading up to the two trials and during the trials, the attorneys have furnished a detailed description of the work carried out and the hours spent on the fisheries issue. They have shown separately the work in connection with the first trial against the Corps

defendants and the State defendant, and the work in connection with the second trial against the FHWA defendants and the State defendant.

They have calculated amounts for each trial based on the number of hours and standard hourly rates for the attorneys involved. The rates are in all cases reasonable. The amount in connection with the first trial is $155,870 plus disbursements of $21,245. The latter figure includes $8,400 for an expert witness. The amount in connection with the second trial is $76,335 plus disbursements of $5,004. The amount for the appeal (before deducting for non-fisheries issues) is $43,025. Plaintiffs have also shown disbursements of $4,180 for the appeal and certain other activities. Using the estimate of two-thirds for the fisheries related work, the amount for the appeal is $29,000 plus $2,800 disbursements.

Plaintiffs contend that a multiplier or premium should be applied to the above figures. Plaintiffs suggest that an appropriate multiplier is 2. Plaintiffs cite two cases. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir.1976); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir.1974). However, these were antitrust class actions, and did not involve an award of attorneys' fees based on bad faith. Plaintiffs have cited no cases involving the latter type of award where a multiplier was used.

Judging from the citations provided by the parties here, the question of whether to apply a multiplier in a bad faith fee award has not been specifically discussed in the cases. However, there is some suggestion that such an award should be limited to the reasonable expenses arising from the bad faith conduct. *See Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir.1977); *Wright v. Jackson*, 522 F.2d 955, 958 (4th Cir.1975); *In re National Student Marketing Litigation*, 78 F.R.D. 726, 728 n. 3 (D.D.C.1978), *aff'd and remanded*, 663 F.2d 178 (D.C. Cir.1980).

In the present case the court declines to apply a multiplier. It is sufficient for plaintiffs' attorneys to be compensated for their time at regular hourly rates. The effect of defendants'

bad faith conduct was to increase the amount of plaintiffs' attorneys' services required for this litigation. The appropriate remedy is to compensate for those services.

The court also declines to award attorneys' fees in connection with the present fee application and work on the State defendant's application for permission to obtain funding for interim work pending the remands to the federal agencies.

This brings us to the final ruling as to liability for attorneys' fees and disbursements. Plaintiffs are entitled to a total award, relating to work on the fisheries issue at the two trials and on the appeal, in the amount of

Fees	
1st trial	$ 155,870
2nd trial	76,335
Appeal	29,000
	$ 261,205

Disbursements	
1st trial	$ 21,245
2nd trial	5,004
Appeal	2,800
	$ 29,049

Since the State defendant participated in both trials and appealed the fisheries rulings, as described above, the State defendant is liable for the entire fee award of $261,205 and disbursements of $29,049, or a total of $290,254.

However, each group of federal defendants is liable for a lesser amount. The Corps defendants participated only in the first trial and did not appeal the fisheries rulings. Therefore the Corps defendants are liable for fees in the amount of $155,870 and disbursements of $21,245, or a total of $177,115. The FHWA defendants participated only in the second trial and did not appeal the fisheries rulings. Therefore the FHWA defendants are liable for fees in the amount of $76,335 and disbursements of $5,004, or a total of $81,339.

Settle judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 3000

SIERRA CLUB, THE CITY CLUB OF NEW YORK, BUSINESS FOR MASS TRANSIT, COMMITTEE FOR BETTER TRANSIT INC., NYC CLEAN AIR CAMPAIGN, INC., WEST 12TH STREET BLOCK ASSOCIATION, HUDSON RIVER FISHERMEN'S ASSOCIATION, HUDSON COUNTY CITIZENS FOR CLEAN AIR, SEYMOUR DURST, OTIS BURGER, MARY ROWE, and HOWARD SINGER,

Plaintiffs,

—v.—

UNITED STATES ARMY CORPS OF ENGINEERS, JOHN MARSH, as Secretary of the Army of the United States, JOSEPH K. BRATTON, as Chief of Engineers, WALTER M. SMITH, JR., as New York District Engineer of the United States Army Corps of Engineers, WILLIAM C. HENNESSY, as Commissioner of the New York State Department of Transportation, UNITED STATES DEPARTMENT OF TRANSPORTATION, ANDREW L. LEWIS, JR., as Secretary of Transporation of the United States, FEDERAL HIGHWAY ADMINISTRATION, RAYMOND A. BARNHART, as Administrator of the Federal Highway Administration,

Defendants,

THE CITY OF NEW YORK,

Defendant-Intervenor.

JUDGMENT

GRIESA, *J.*

The Court has previously issued a Judgment dated April 14, 1982 on claims against the defendant United States Army

Corps of Engineers (the "Corps") and its officials, and defendant William Hennessy, as Commissioner of the New York State Department of Transportation (the "State"), in connection with the highway and urban renewal project known as "Westway", and a second Judgment dated July 23, 1982 on claims against the defendants United States Department of Transportation and the Federal Highway Administration ("FHWA"), as well as certain officers of those agencies. Thereafter, plaintiffs, Sierra Club, The City Club of New York, NYC Clean Air Campaign, Inc. and Hudson River Fishermen's Association ("plaintiff-applicants") applied to the Court for an award of attorneys' fees and disbursements against the Corps, FHWA and the State in connection with the proceedings that resulted in such Judgments.

The Court has considered the submissions of all the parties relating to the plaintiff-applicants' application, and has rendered a decision dated June 27, 1984, making findings of fact and conclusions of law.

IT IS ORDERED, DECLARED AND ADJUDGED THAT:

I.

Plaintiff-applicants are entitled to recover certain amounts for attorneys' fees and disbursements, as set forth in Section II below, under the common law. Plaintiff-applicants' claim against the United States under 28 U.S.C. § 2412(d) is denied.

II.

1. Plaintiff-applicants are awarded attorneys' fees and disbursements against the respective defendants as follows:

A. As against the State, attorneys' fees in the amount of $261,205, plus disbursements in the amount of $29,049, for a total of $290,254, together with interest as specified in paragraph 2 below.

B. As against the Corps, attorneys' fees in the amount of $155,870, plus disbursements in the amount of

$21,245, for a total of $177,115, together with interest as specified in paragraph 2 below.

C. As against FHWA, attorneys' fees in the amount of $76,335, plus disbursements in the amount of $5,004, for a total of $81,339, together with interest as specified in paragraph 2 below.

2. Interest shall accrue and be payable on the amounts awarded to plaintiff-applicants, to the extent permitted by law, from the date of entry of this Judgment to the date of payment.

3. The respective defendants shall be jointly and severally liable to the plaintiff-applicants for the full amount of the fees and disbursements awarded herein, subject to the following limitations:

A. The liability of the State shall be limited to $290,254, plus interest on such amount as specified in paragraph 2.

B. The liability of the Corps shall be limited to $177,115, plus interest on such amount as specified in paragraph 2.

C. The liability of FHWA shall be limited to $81,339, plus interest on such amount as specified in paragraph 2.

D. In no event shall plaintiff-applicants' total recovery exceed $290,254, plus interest on such amount in accordance with the provisions of paragraph 2.

4. Subject to the limitations set forth in paragraph 3, plaintiff-applicants shall be entitled to recover the attorneys' fees and disbursements awarded herein against any one or more of the defendants, without apportionment. Nevertheless, the defendants shall have the right of contribution against each other.

5. Except as set forth herein, plaintiff-applicants' application for the award of attorneys' fees and disbursements is denied.

6. This Court retains jurisdiction over this action for all purposes, including without limitation, for the purpose of enabling any of the parties to apply to the Court for such further orders or directions as may be necessary or appropriate, for consideration of any further application for legal fees or other costs, and for the purpose of securing compliance with this Judgment.

Dated: New York, New York
July 19, 1984

/s/ THOMAS P. GRIESA
Thomas P. Griesa
U.S.D.J.

AKB:110

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

SIERRA CLUB, THE CITY CLUB OF NEW YORK, NYC CLEAN AIR CAMPAIGN, INC., and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEPHEN L. KASS
(Counsel of Record)
JEAN M. MCCARROLL
BUTZEL & KASS
Attorneys for Respondents
45 Rockefeller Plaza
New York, New York 10111
(212) 765-1800

February 27, 1986

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The Sierra Club, a respondent herein, is a California corporation, has no parent companies or subsidiaries (other than wholly owned subsidiaries), and has two affiliates, the Sierra Club Foundation and the Sierra Club Legal Defense Fund.

The City Club of New York is a New York not-for-profit corporation, has no parent companies or subsidiaries (other than wholly owned subsidiaries), and has one affiliate, the City Club Research Foundation, Inc.

The NYC Clean Air Campaign, Inc. is New York not-for-profit corporation and has no parent companies, subsidiaries (other than wholly owned subsidiaries), or affiliates.

The Hudson River Fishermen's Associa-

tion is a New York not-for-profit corporation and has no parent companies, subsidiaries (other than wholly owned subsidiaries), or affiliates.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-1263

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Petitioner,

- against -

SIERRA CLUB, THE CITY CLUB OF NEW YORK, NYC CLEAN AIR CAMPAIGN, INC., and HUDSON RIVER FISHERMEN'S ASSOCIATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This brief is submitted on behalf of the respondents in opposition to the petition of the New York State Department of Transportation ("NYSDOT" or the

"petitioner") for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. The petitioner seeks review of the portion of the Second Circuit's opinion and judgment in Sierra Club v. United States Army Corps of Engineers, 776 F.2d 383 (2d Cir. 1985), that upheld an award of attorneys' fees against the petitioner.

The litigation in which the attorneys' fees award was made concerned the proposal to build the West Side Highway Project ("Westway") along the Hudson River shoreline of Manhattan. In the course of the litigation against NYSDOT, the United States Army Corps of Engineers (the "Corps"), and the Federal Highway Administration ("FHWA"), the defendants were found to have violated the National Environmental Policy Act,

42 U.S.C. §§4321 et seq., and section 404 of the Clean Water Act, 33 U.S.C. §1344. As a result, Westway was enjoined in 1982 and again in 1985. See Action for Rational Transit v. West Side Highway Project, 536 F. Supp. 1225 (S.D.N.Y. 1982), aff'd in part, rev'd in part sub nom. Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983); Sierra Club v. United States Army Corps of Engineers, 541 F. Supp. 1367 (S.D.N.Y. 1982), aff'd in part, rev'd in part, 701 F.2d 1011 (2d Cir. 1983); Sierra Club v. United States Army Corps of Engineers, 614 F. Supp. 1475 (S.D.N.Y.), aff'd in part, rev'd in part, 772 F.2d 1043 (2d Cir. 1985).

Westway was to be built in a landfill of approximately 200 acres in the Hudson River. In two trials in 1982,

the district court found that the defendants, principally NYSDOT, had suppressed important information revealing abundant fish, notably striped bass, in the area to be filled and had falsely maintained that the area was a "biological wasteland." The district court found that in so doing the defendants had acted in bad faith, see, e.g., 541 F. Supp. at 1379, 1381, and the Second Circuit explicitly upheld those findings as to NYSDOT and the FHWA. See 701 F.2d at 1047.

Four of the plaintiffs in the underlying litigation, who are the respondents herein, applied for attorneys' fees for the portion of the litigation involving the 1982 trials, under the common law and, against the federal defendants, under the Equal Access to Justice Act, 28 U.S.C. §2412(d)

("EAJA"). In 1984, the district court awarded part of the requested fees under the "bad faith" exception to the common law rule on attorneys' fees. Sierra Club v. United States Army Corps of Engineers, 590 F. Supp. 1509 (S.D.N.Y. 1984). In awarding fees for bad faith conduct before and during trial, the district court described NYSDOT's defenses at trial as "lacking in any colorable basis" and called the lack of credibility of the defense witnesses "abnormal and extraordinary." Id. at 1525. The Second Circuit upheld the bad faith award against NYSDOT, for the trial work but not the appellate work, but reversed the bad faith award against the Corps, holding that the plaintiffs were entitled to fees against the Corps under EAJA instead of

the common law.[1] 776 F.2d at 391-92, 394.

NYSDOT argued in both the district court and the court of appeals that the Eleventh Amendment to the United States Constitution shields it from any attorneys' fees award against it in federal court. Both the district court and a unanimous panel of the Second Circuit rejected that argument. In doing so, they relied on the decisions of this Court as well as Second Circuit precedent.

The petitioner now argues that the Second Circuit ruled incorrectly on the issue of whether the Eleventh Amendment bars an award of bad faith attorneys' fees against a state and that there is

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[1] The FHWA did not appeal the award of bad faith attorneys' fees against it.

an intolerable conflict among the courts of appeals on that issue. The petitioner is wrong. For the reasons stated below, the respondents respectfully urge this Court to deny the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

POINT I

THIS COURT NEED NOT DECIDE WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF ATTORNEYS' FEES AGAINST A STATE, SINCE THE COURT HAS ALREADY RULED ON THAT ISSUE

The question the petitioner asks this Court to resolve is one that does not need to be resolved, since the Court has already addressed it and found the Eleventh Amendment not to be a bar to the award of attorneys' fees against a state. The Court's most extensive consideration of the question of attorneys' fees against a state was in Hutto v. Finney, 437 U.S. 678 (1978).

In Hutto, this Court explicitly upheld the award of attorneys' fees against state officials both under the common law "bad faith" theory and under the statutory attorneys' fees provision

in 42 U.S.C. §1988. As to the award under the common law, the Court stated that "the substantive protections of the Eleventh Amendment do not prevent an award of attorneys' fees against the [State Correction] Department's officers in their official capacities." Id. at 692. The Court explained the purpose of the award as follows: "The award vindicates judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy." Id. at 689 n.14. Furthermore, the Court analyzed the application of its decision in Edelman v. Jordan, 415 U.S. 651 (1974), to the attorneys' fees situation and then explicitly placed the bad faith attorneys' fees award it approved within the

Edelman category of costs that are "ancillary" to prospective relief. Id. at 690.

The petitioner attempts to distinguish the present case from Hutto on the ground that the award in Hutto was justified by the state officials' violation of court orders. The bad faith conduct in the present case, however, consisted of the petitioner's deliberate suppression -- both before and during trial -- of information it was obligated by law to reveal. Surely, litigants should not have to be ordered to testify truthfully, and it should not be constitutionally significant that the petitioner was not under such explicit orders. As the district court found in the instant case, "the Commissioner [of NYSDOT] was bound to observe the rules and standards of conduct

applicable in a federal court. It necessarily follows that the Commissioner should be subject to sanctions, including the assessment of attorneys' fees and disbursements, for failure to observe these rules and standards." 590 F. Supp. at 1526-27.

After its decision in Hutto, this Court affirmed the Second Circuit's ruling in Gagne v. Maher, which had upheld an award of attorneys' fees against the Connecticut Commissioner of Social Services, despite the commissioner's Eleventh Amendment challenge. 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980). Although this Court's opinion in Gagne dealt with statutory attorneys' fees rather than common law fees, the Court repeated its discussion in Hutto v. Finney, supra, of attorneys' fees as part of litigation costs,

which a court has "inherent authority" to award as a means of controlling the litigants before it. Maher v. Gagne, supra, 448 U.S. at 132 n.14. Accord, Kentucky v. Graham, 473 U.S. ____, 105 S. Ct. 3099, 3107 n.18 (1985) ("Monetary relief that is 'ancillary' to injunctive relief . . . is not barred by the Eleventh Amendment.").

The rationale for the award of bad faith attorneys' fees in the instant case is the same as that for the award of bad faith attorneys' fees in Hutto: the vindication of judicial authority. Accordingly, Hutto is directly applicable and controlling in these circumstances.

POINT II

THERE IS NO PRESENT CONFLICT AMONG THE COURTS OF APPEALS AS TO WHETHER THE ELEVENTH AMENDMENT BARS AN AWARD OF ATTORNEYS' FEES AGAINST A STATE

The petitioner urges this Court to grant certiorari in this case as the only way to resolve an alleged conflict among the circuits on the issue of whether the Eleventh Amendment bars attorneys' fees awards against a state. It appears to the respondents, however, that there is no longer such a conflict.

The alleged conflict appears to have been resolved by this Court's decision in Hutto v. Finney, supra, which is discussed in Point I above. In the present case, the Second Circuit correctly followed this Court's decisions, including Hutto, as well as Second Circuit precedents, in deciding that the Eleventh Amendment presents no bar to

the award of attorneys' fees against NYSDOT in these circumstances.

The Second Circuit did note in its opinion the existence of cases in other circuits holding a contrary view. 776 F.2d at 388-89. Those cases, however, all predate Hutto and this Court's affirmance of Gagne v. Maher, supra, and are no longer tenable. Thus, they do not present a current conflict among the circuits requiring this Court's resolution.

The cases creating the alleged conflict with the Second Circuit's position are cited on pages 7-8 of the petition. Not one of the cases was decided after 1976. Accordingly, none took into account this Court's ruling in Hutto and its affirmance of Gagne v. Maher, supra.

Moreover, the cases relied on by the

petitioner rest on the assumption that attorneys' fees are damages. See, e.g., Huecker v. Milburn, 538 F.2d 1241, 1244 (6th Cir. 1976); Jordan v. Gilligan, 500 F.2d 701, 709 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975).[2] That assumption, which the petitioner has adopted, is contrary to the view of this Court. In Hutto, the Court made it clear that attorneys' fees should be classed with costs rather than with damages. See 437 U.S. at 690 & n.14, 695-98. In two very recent cases concerning attorneys' fees, the Court has reiterated the view that attorneys' fees are costs, not

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[2] Moreover, Jordan v. Gilligan is not directly relevant here, since it did not concern an award of bad faith attorneys' fees.

damages.[3] See Kentucky v. Graham, supra, 105 S. Ct. at 3104 & n.7; Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 1973 & n.4, 1982 (1984). Accordingly, the decade-old cases from the Sixth Circuit,[4] which rest on discredited premises, should not be used to create a conflict requiring resolution.

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[3] It is significant that in its petition for certiorari on a question involving attorneys' fees, NYSDOT declines even to mention this Court's recent rulings in attorneys' fees cases and instead relies on decisions that have nothing to do with fees, such as Green v. Mansour, __ U.S. __, 106 S. Ct. 423 (1985), Atascadero State Hospital v. Scalon, __ U.S. __, 105 S. Ct. 3142 (1985), and Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

[4] The main Fourth Circuit case cited by the petitioner, Hallmark Clinic v. North Carolina Department of Human Resources, 519 F.2d 1315 (4th Cir. 1975) is inapposite because the Court

(Footnote Continued)

POINT III

THE QUESTION PRESENTED IN THE PETITION ARISES ONLY RARELY AND IS NOT IMPORTANT ENOUGH TO JUSTIFY GRANTING THE WRIT

Even if there were a current conflict among the circuits, which there is not, as explained in Point II, this Court should not grant the writ. The question presented arises only rarely and thus is not important enough to justify granting the writ.

Review on a writ of certiorari is reserved for cases in which "there are special and important reasons therefor." Sup. Ct. R. 17. Among the considerations in determining whether an issue is sufficiently important to justify granting the writ are whether a

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(Footnote Continued)
there denied fees not on Eleventh Amendment grounds, but rather because it found no bad faith. Id. at 1317.

significant number of people are affected by the issue, see, e.g., Lay v. Williams, 434 U.S. 910 (1977) (White, J., dissenting from denial of petitions for writ of certiorari), and whether many suits arise involving the issue, see, e.g., Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235, 237 (1964).

Mere existence of a conflict among the circuits is not sufficient to justify granting the writ. Indeed, the Court has refused to grant certiorari in many cases involving issues on which there was a conflict. See, e.g., California Department of Industrial Relations v. Homemakers, Inc. of Los Angeles, 423 U.S. 1063, 1063 (1976) (White, J., dissenting) (petition for a writ of certiorari denied in case

concerning whether a state statute requiring employers to pay premium overtime wages to female, but not male, employees conflicted with and was preempted by Title VII of the Civil Rights Act of 1964, a question on which there was a "square conflict" among the circuits); Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000, 1000-01 (1975) (White, J., dissenting) (petition denied in case concerning whether a private hospital with substantial public funding and control may refuse to perform elective abortions, an issue on which there was a "clear" conflict among the circuits); Bailey v. Weinberger, 419 U.S. 953, 953 (1974) (White, J., dissenting) (petition denied in case concerning claims for Social Security benefits and presenting

an issue on which there was a square conflict among the circuits).

The instant case is not one on which the scarce resource of this Court's time should be spent, since it involves an unusual situation that is unlikely to arise frequently in the future. Bad faith attorneys' fees are rarely awarded against anyone, because the requirements for such awards are so stringent.[5] See, e.g., Nemeroff v.

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[5] Statutory attorneys' fees, for which the requirements are less stringent, are more common. Ironically, in this case, if this Court were to grant the petition and reverse the Second Circuit's decision, the burden of the petitioner's wrongdoing would fall on the federal government as well as on the respondents. This would occur because the Second Circuit ruled that the Corps was liable for fees under EAJA, although not under the common law. Thus, the Corps will be obliged to pay fees to the respondents and, if the bad faith award against

(Footnote Continued)

Abelson, 620 F.2d 339, 348 (2d Cir. 1980); Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977). Bad faith attorneys' fees against a state are rarer still and are awarded only in the most extraordinary circumstances. Most of the cases cited by the petitioner do not involve awards of bad faith attorneys' fees against a state. Among those that do, only two, Hutto v. Finney, supra, and Gagne v. Maher, supra, were decided since 1976. Where so few persons and so few cases are affected, this Court should decline to

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(Footnote Continued)
NYSDOT were reversed, would not be entitled to contribution from NYSDOT, which both the district court and the Second Circuit found to be the principal wrongdoer. See 776 F.2d at 391-92; 590 F. Supp. at 1523-25.

grant NYSDOT's petition for a writ of certiorari.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STEPHEN L. KASS
Counsel of Record

Jean M. McCarroll
Butzel & Kass
Attorneys for Respondents
45 Rockefeller Plaza
New York, New York 10111
(212) 765-1800

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